

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 69

**NATIONAL LABOR RELATIONS BOARD,
PETITIONER,**

vs.

**RADIO & TELEVISION BROADCAST ENGINEERS'
UNION, LOCAL 1212, INTERNATIONAL BROTHER-
HOOD OF ELECTRICAL WORKERS, AFL-CIO**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**PETITION FOR CERTIORARI FILED APRIL 15, 1960
CERTIORARI GRANTED MAY 31, 1960**

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BEFORE NATIONAL LABOR RELATIONS BOARD

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

**RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL
1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORK-
ERS, AFL-CIO.**

Case No. 2-CD-146

- 4.26.57 Charge filed.
- 5.16.57 Notice of charge filed & notice of hearing issued.
- 6. 5.57 Regional Director's order rescheduling hearing dated.
- 6.12.57 Regional Director's order rescheduling hearing dated.
- 6.19.57 Hearing opened.
- 6.26.57 Hearing closed.
- 11.25.57 Decision and determination of dispute issued.
- 12.27.57 Complaint and Notice of hearing issued.
- 1. 6.58 Respondent's answer to the complaint sworn to.
- 2.10.58 Hearing reopened.
- 2.10.58 Hearing closed.
- 4.29.58 Trial Examiner's Intermediate Report issued.
- 6.10.58 Respondent's exceptions to the Intermediate Report received together with request for oral argument, (oral argument denied see page 15, footnote 1 of Decision and Order).
- 10. 9.58 Decision and Order issued.

BEFORE NATIONAL LABOR RELATIONS BOARD

Intermediate Report—April 29, 1958

STATEMENT OF THE CASE

Pursuant to a hearing under Section 10 (k) of the Act and Sections 102.71 and 102.72 of the Board's Rules and Regulations, on November 25, 1957, the Board issued its [fol. 2] Decision and Determination of Dispute¹ in this proceeding, finding that Respondent herein, Local 1212 International Brotherhood of Electrical Workers, AFL-CIO, was not entitled, either by certification of the Board or a contract with Columbia Broadcasting System, Inc., covering certain disputed work, to perform that work. Based upon the evidence before it consisting of 338 pages of transcript and a number of written pieces of evidence, the Board found reasonable cause to believe (1) that Local 1212 had engaged in, and had induced and encouraged CBS employees to engage in, a strike or a concerted refusal in the course of their employment to perform services for CBS, with an object of forcing or requiring CBS to assign the disputed work to technicians who were members of Local 1212 rather than to stage hands and other CBS employees who were members of Local 1 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, herein called Local 1; and (2) that Local 1212 thereby violated Section 8 (b) (4) (D) of the Act. The work in dispute is the operation of lights on remote television pickups. The Board, which had the contracts before it, found that this work was not covered by either CBS' contract with Local 1212 or its contract with Local 1. In the Decision and Determination of Dispute the Board directed that within 10 days from its issuance, Local 1212 "shall notify the Regional Director for the Second Region in writing whether or not it will refrain from forcing or requiring CBS, by means proscribed by Section 8 (b) (4) (D) of the [fol. 3] Act, to assign the disputed work to its members rather than to other employees of CBS," who are members of Local 1.

¹ 119 NLRB No. 71.

The hearing before me, brought under Section 10 (b) of the National Labor Relations Act as amended, 61 Stat. 136 (herein called the Act), and testing whether in fact Respondent Local 1212 has violated and is violating Section 8 (b) (4) (D) of the Act, took place in New York, New York, on February 10, 1958. The complaint, issued on December 27, 1957, by the General Counsel of the National Labor Relations Board, herein called the General Counsel and the Board, and based on charges duly filed and served, set forth the Board's findings and order in its Decision and Determination of Dispute, and alleged that at all times since November 25, 1957, Local 1212 has failed and refused to comply with the Decision and Determination of Dispute. In its answer Respondent Local 1212 denied the commission of any unfair labor practices, and as and for a separate defense alleged that the proceedings herein under Section 10 (k) of the Act were unlawful and of no force and effect because Local 1212 was denied full opportunity to develop its case and present its evidence, and further, that the Board's Decision and Determination of Dispute, reported at 119 NLRB No. 71, was erroneous both as to law and fact.

All parties were represented at the hearing and were afforded opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally and to file briefs. Local 1212 and CBS filed briefs which have been carefully considered.

Upon the entire record in the case, including the proceedings under Section 10 (k) of the Act, I make the following:

[fol. 4] FINDINGS OF FACT

I. The Labor Organization Involved

Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, and Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

II. The Business of the Company

Columbia Broadcasting System, Inc., a New York corporation, is, and has been at all times material herein, en-

gaged in radio and television network transmission in various States of the United States, and, at all times material herein, it owned and operated radio and television stations, under license issued by the Federal Communications Commission, in various States of the United States, including television station CBS-TV located in the City and State of New York. During the year prior to the issuance of the complaint CBS, in the course and conduct of operating the radio and television stations which it owned, had a gross income from said operations in excess of \$1,000,000. CBS is, and at all times material herein has been, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

[fol. 5] III. The Unfair Labor Practices

A. *The violation of Section 8 (b) (4) (D)*

In its Decision and Determination of Dispute herein the Board has already found the following facts, which were based upon the overwhelming preponderance of the evidence taken, and which were not disputed in the hearing before me:

On or about April 9, 1957, CBS first advised Local 1212 that it intended to assign to its Stage Hands, in Local 1's unit, the work of setting up and operating the lights for the Antoinette Perry Awards scheduled for telecast on April 21. This telecast was to originate on the stage of the Grand Ballroom of the Waldorf Astoria Hotel, in connection with other acts to be staged by the American Theater Wing. The work assignment was pursuant to the belief of CBS that it was not contractually bound to assign this remote lighting work to either labor organization.

On April 18, Local 1212 Business Manager Calame protested to CBS Vice President Fitts, who was in charge of labor relations, and threatened "trouble" if CBS insisted on assigning the work to Local 1. At about the same time, IBEW International Representative Lighty and Local 1212 Business Representative Pantell, who was Calame's assistant called on Fitts, insisted that Local 1212 was entitled to the work, and again threatened there would be trouble if the work was not done by Local 1212.

In the afternoon of April 21, after the stage hands had carried out CBS' instructions to install the necessary [fol. 6] lights for the stage show in the Grand Ballroom, the technicians proceeded to install duplicate lights, without any instructions from CBS. When Local 1212 Representative Pantell was asked why, he replied in the presence of the technicians, "this is an IBEW job. If we don't use our lights we are not doing the show." Later that afternoon, CBS representative Levin definitely advised Pantell that Local 1 would operate the necessary lights, and ordered the technicians to remove the duplicate lights. Bell, as spokesman for the technicians, refused. Pantell, who was present at the time, then called a meeting of the technicians to discuss the jurisdictional dispute, and as a result advised the CBS representatives again that if Local 1's lights were used, Local 1212 would not operate the cameras and the necessary incidental equipment even if its duplicate lights were also used. The technicians accordingly refused to complete the installation of the necessary microphones, refused to make pictures, and refused to report for the scheduled rehearsal between 6 and 7 p. m. Unwilling to accede to Local 1212's ultimatum to reassign the work to it, CBS at first ordered its technicians to remove the telecasting equipment, and some of it in fact was removed. Later, CBS countermanded its order, and instructed the technicians to reset the equipment. However the technicians refused to do so. Once again at about 10:30 or 11 p. m., CBS Representative Levin asked the technicians to make pictures, and was again refused.

As a result of the foregoing activity by Local 1212, the scheduled program was not telecast.

[fol. 7] Thus all the factors essential for a finding of a violation of Section 8 (b) (4) (D) are here present: It is clear from the record that Local 1212 was responsible for the refusal to do the work; by its conduct Local 1212 induced and encouraged the employees of CBS to engage in a concerted refusal to perform services for CBS; its object was to force CBS to assign this remote lighting work to members of Local 1212 rather than to members of Local 1; and, CBS was not failing to conform to any order or certification of the Board determining the bargaining representative for the employees performing the work in dispute.

Shortly after the issuance of the Board's Decision and Determination of Dispute an officer in the Board's Regional Office wrote Local 1212, directing it to notify the Regional Director in writing the steps it had taken to comply with the terms of the Board's Decision and Determination. On December 11, 1957, counsel for Local 1212 replied in writing that:

My client, Radio and Television Broadcast Engineers Union, Local 1212, IBEW, AFL-CIO, will not comply with the decision and determination of the National Labor Relations Board in this case, dated November 25, 1957. The Board's decision is erroneous, both as to law and fact. It is my client's intention to press this matter to an ultimate review by an appropriate court of law.

B. Contentions of Local 1212; and conclusions

At the hearing before me, and in its brief, Local 1212 made two basic contentions which it contends dispose of the case. It contended that at both hearings herein—the [fol. 8] 10 (k) hearing and the 8 (b) (4) (D) hearing—it was deprived of a full and complete hearing because it was not permitted to introduce evidence concerning CBS' custom and practice in assigning the disputed work; and it contended that the Board failed in its duty to make an affirmative award of jurisdiction as between Local 1212 or Local 1. Respondent contends that in view of these errors by the Board and its agents, the Board's Decision and Determination of Dispute is unlawful and Respondent has no duty to comply with it—so that its failure to comply can be no basis for a finding of an 8 (b) (4) (D) violation. These contentions are without merit.

1. In its Decision and Determination of Dispute herein the Board found that in CBS' separate negotiations with Local 1212 and Local 1, each union sought to include remote lighting in the coverage of its agreement and CBS refused; and that in fact remote lighting was not covered by either contract. The Board found further that in the negotiations between CBS and Local 1212, "the parties in fact agreed that the issue of remote lighting assignments remained unresolved."

In footnote 2 of its Decision and Determination of Dispute herein the Board stated,

The hearing officer rejected, as irrelevant and not bearing on the issues, Local 1212's offer of evidence that CBS' custom or practice was to assign to it the disputed work, more particularly described below. The ruling was proper. *I. L. A. (Kaplan)*, 116 NLRB 1933, 1536; *Local 675, etc. (Port Everglades Terminal Company)*, 116 NLRB 27, 37-38. See also *Local 16, etc. (Denali-McCray Construction Company)*, 118 NLRB No. 12; *Radio & Television [fol. 9] Broadcast Engineers Union, Local 1212; etc. (CBS)*, 114 NLRB 1354, 1358.

Cf. *I. L. A., etc. (Bellco Industrial Engineering Co., et al.)*, 119 NLRB No. 16. In the *Port Everglades* case, *supra*, the Board said,

Finally, as neither enjoys clear contractual privileges over the work, Board precedent precludes definitive consideration of the further contention advanced by the ILA or the Operating Engineers that "custom and practice" supports their respective demands for the disputed oiler work.

At this point the Board said in a footnote,

The Board has consistently held that evidence tending to establish that, by tradition and custom, a particular union's members have performed work in dispute, are (sic) not material where, as here, the union relying on such facts has no immediate, enforceable, contractual claim to the disputed work. See, e.g., *United Association of Journey-men and Apprentices of the Plumbing and Pipefitting Industry*, 108 NLRB 186, 200; *Los Angeles Building and Construction Trades Council*, 83 NLRB 477.

In the *Kaplan* case, *supra*, the Board stated,

We hold, moreover, as we did in the *Port Everglades* case, that a contract is no defense to a claim to disputed work where the contract fails to provide a basis for the claim in clear and unambiguous terms, regardless of past custom and practice.

In the 8 (b) (4) (D) hearing, Local 1212 sought to introduce the same evidence concerning custom and practice as to assignment of the disputed work which was rejected in the 10 (k) hearing, plus "additional evidence along the [fol 10] same line." The offer of proof was rejected on

the ground that that issue had already been passed upon by the Board in footnote 2 above. The offer went to the issue of entitlement to the disputed work, which was passed upon by the Board following the 10 (k) hearing in its Decision and Determination of Dispute.

2. Concerning the Board's alleged duty to make an affirmative award of jurisdiction, Respondent relied upon the recent decision of the Court of Appeals for the Third Circuit, *N. L. R. B. v. Locals 420, 428, United Ass'n of Journeymen and Apprentices, AFL (Frank W. Hake)*, 242 F.2d 722 (3rd Cir. 1957), 39 LRRM 2629. The Board respectfully disagrees with that decision and holds the view that it is not incumbent upon the Board to make such a determination. *Local 450, International Union of Operating Engineers, AFL-CIO (Turner Construction, Hinote)*, 119 NLRB No. 44, footnote 14. See also *International Union of Operating Engineers, Local Union No. 12, AFL-CIO (West Coast Masonry Contractors, Inc.)*, 120 NLRB No. 5, footnote 7; *Local 16, ILWU (Dendli-McCray Construction Co.)*, 118 NLRB No. 12, footnote 4. In *Insurance Agents' International Union, AFL-CIO (Prudential Insurance Company of America)*, 119 NLRB No. 103, the Board said,

It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a trial examiner to speculate as to what [fol. 11] course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the trial examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

All of the elements necessary for a finding of a violation of Section 8 (b) (4) (D) being here present, Respondent having refused to comply with the Board's Decision and Determination of Dispute, and Respondent having

come forward with no adequate defense, I conclude on the preponderance of the evidence that Respondent has violated and is violating Section 8 (b) (4) (D) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8 (b) (4) (D) of the Act, I shall recommend that it cease and desist from such conduct, and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in a strike or a concerted refusal in the course of their employment to perform services with an object of forcing or requiring Columbia Broadcasting System, Inc., to assign the work of operating lights on remote television pickups to members of Local 1212 rather than to members of Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Respondent, Local 1212, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, its representatives, agents, successors and assigns, shall:

1. Cease and desist from engaging in, or inducing or encouraging the employees of Columbia Broadcasting

System, Inc., to engage in, a strike or a concerted refusal in the course of their employment to perform services, where an object thereof is to force or require Columbia Broadcasting System, Inc., to assign the work of operating lights on remote television pickups to members of Local 1212 rather than to members of Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the [fol. 13] United States and Canada, AFL-CIO, unless Columbia Broadcasting System, Inc., is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its business office and meeting hall in New York and on any bulletin board at Columbia Broadcasting System, Inc., New York, New York, where Local 1212 customarily posts any notices to its members, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by its official representative, be posted by Respondent immediately upon receipt thereof, and maintained for a period of sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to members of Respondent are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this Intermediate Report, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C., this 29th day of April, 1958.

Alba B. Martin, Trial Examiner.

[fol. 14] APPENDIX A TO INTERMEDIATE REPORT

Notice

To all members of Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO

Pursant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We will not engage in, or induce or encourage the employees of Columbia Broadcasting System, Inc., to engage in, a strike or a concerted refusal in the course of their employment to perform any services, where an object thereof is to force or require Columbia Broadcasting System, Inc., to assign the work of operating lights on remote television pickups to members of Local 1212 rather than to members of Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, unless Columbia Broadcasting System, Inc., is failing to conform to an order or certification of the [fol. 15] Board determining the bargaining representative for employees performing such work.

Radio & Television Broadcast Engineers Union,
Local 1212 International Brotherhood of Electrical Workers, AFL-CIO, (Labor Organization),
By — (Agent) or (Representative) — (Title).

Dated —, —, —.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

BEFORE NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER—October 9, 1958

On April 29, 1958, Trial Examiner Alba B. Martin issued his Intermediate Report in this case, finding that the Re-

spondent Union had engaged and was engaging in certain unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Union filed exceptions to the Intermediate Report and a brief.¹

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

[fol. 16] The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.²

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, and its officers, representatives, agents, successors and assigns:

1. Cease and desist from engaging in, or inducing or encouraging the employees of Columbia Broadcasting System, Inc. to engage in, a strike or a concerted refusal in the

¹ The Union also requested oral argument. In our opinion, the record, exceptions and brief fully present the issues and the positions of the parties. Accordingly, the request for oral argument is hereby denied.

² For the reasons set forth in *Local 173, Wood, Wire & Metal Lathers International Union, AFL-CIO (Newark & Essex Plastering Co.)*, 121 NLRB No. 137, we respectfully disagree with the decision of the Court of Appeals for the Third Circuit in *N. L. R. B. v. Pipefitters Locals (Frank W. Hake)*, 242 F. 2d 722, to the extent that our decision herein may conflict therewith.

course of their employment to perform any services, where an object thereof is to force or require Columbia Broadcasting System, Inc. to assign the work of operating lights on remote television pick-ups to members of the Respondent Union rather than to members of Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, except insofar as [fol. 17] such action is permitted under Section 8 (b) (4) (D) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business office and union hall in New York, New York, and on any bulletin board at Columbia Broadcasting System, Inc. in New York, New York, where the Respondent Union customarily posts notices to its members, copies of the notice attached hereto marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Second Region, shall be immediately signed, posted, and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Second Region in writing, within ten (10) days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., Oct. 9, 1958.

Philip Ray Rodgers, Member, Stephen S. Bean, Member, John H. Fanning, Member, National Labor Relations Board. (Seal).

³ In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of a United States Court of Appeals, enforcing an Order."

[fol. 18] APPENDIX TO DECISION AND ORDER

Notice

To All Members of Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO:

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not engage in, or induce or encourage the employees of Columbia Broadcasting System, Inc. to engage in, a strike or a concerted refusal, in the course of their employment to perform any services, where an object thereof is to force or require Columbia Broadcasting System, Inc. to assign the work of operating lights or remote television pickups to members of our Union rather than to members of Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, except insofar as such action is permitted under Section 8 (b) (4) (D) of the Act.

Radio & Television Broadcast Engineers Union,
Local 1212, International Brotherhood of Electrical
Workers, AFL-CIO. (Labor Organization). By
— — (Representative). (Title).

Dated —, —, —.

[fol. 19] This notice must remain posted for sixty days from the date hereof, and must not be altered, defaced, or covered by any other material.

BEFORE NATIONAL LABOR RELATIONS BOARD

DECISION AND DETERMINATION OF DISPUTE—Nov. 25, 1957

On April 26, 1957, Columbia Broadcasting System, Inc., herein called CBS, filed a charge with the Regional Director for the Second Region, alleging that Radio & Television Broadcast Engineers Union, Local 1212, International

Brotherhood of Electrical Workers, AFL-CIO; herein called Local 1212, had engaged and was engaging in certain unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act.

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.71 and 102.72 of the Board's Rules and Regulations, the Regional Director investigated the charge and provided for an appropriate hearing upon due notice. The hearing was held at New York, New York, on various dates between June 29 and 25, 1957, before I. L. Broadwin, hearing officer. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross examine witnesses, and to adduce evidence bearing on the issues.¹ The rulings of the hearing officer made at the hearing are free from prejudicial error and are hereby [fol. 20] affirmed.² Briefs have been filed by CBS and Local 1; none was filed by Local 1212.

Upon the entire record in this case the Board³ makes the following:

FINDINGS OF FACT

1. CBS is engaged in commerce within the meaning of the Act.

¹ The hearing officer granted a motion to intervene, made by Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO herein called Local 1.

² The hearing officer rejected, as irrelevant and not bearing on the issues, Local 1212's offer of evidence that CBS's custom or practice was to assign to it the disputed work, more particularly described below. The ruling was proper. *I. L. A. (Kaplan)*, 116 NLRB 1533, 1536; *Local 675, etc. (Port Everglades Terminal Company)*, 116 NLRB 27, 37-38. See also *Local 16, etc. (Denali-McCray Construction Company)*, 118 NLRB No. 12; *Radio & Television Broadcast Engineers Union, Local 1212, etc. (CBS)*, 114 NLRB 1354, 1358.

³ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

2. Local 1212 and Local 1 are each labor organizations within the meaning of the Act.

3. On February 14, 1952, Local 1212 was certified as the statutory representative of all technicians in certain departments of CBS, excluding lighting directors and special visual effects employees in New York City, and also excluding stage hands. The certification does not expressly mention the work here in dispute, which is the operation of lights on remote television pick-ups.

On June 23, 1955, CBS entered into an agreement with Local 1, which represents the stage hands, to remain in effect up to and including December 31, 1957. The agreement includes in its coverage stage electricians and stage and front light men operating spotlights and other lighting [fol. 21] devices used in connection with television performances at New York City stages or shops and at other mutually agreed-on theaters and spot locations. In the negotiations CBS, unable to obtain agreement between Local 1 and its rival Local 1212 on the assignment of the work of remote lighting, had refused Local 1's demands to include remote lighting in the coverage of the agreement, and the parties in fact agreed that the issue of remote lighting assignments remain unresolved.

On May 1, 1956, CBS entered into a no-strike union-security agreement for an initial term to and including January 31, 1958, with International Brotherhood of Electrical Workers, AFL-CIO, herein called IBEW, for and in behalf of Local 1212 and other locals not here involved. The agreement, generally covering the technical employees, includes in its coverage the operation of television equipment and apparatus by means of which electricity is applied in the transmission, transference, production or reproduction of vision with and/or without ethereal aid. In the negotiations IBEW had demanded inclusion of the set-up and operation of lighting equipment used on field or remote pick-ups. As with Local 1, CBS had refused this demand, on the ground that the rival locals had failed to agree on the resolution of this jurisdictional dispute over remote lighting. The question of remote lighting assignments accordingly remained unresolved in this agreement as well.

On or about April 9, 1958, CBS first advised Local 1212

that it intended to assign to its stage hands, in Local 1's [fol. 22] unit, the work of setting up and operating the lights for the Antoinette Perry Awards scheduled for telecast on April 21. This telecast was to originate on the stage of the Grand Ballroom of the Waldorf Astoria Hotel, in connection with other acts to be staged by the American Theater Wing. The work assignment was pursuant to the belief of CBS that it was not contractually bound to assign this remote lighting work to either labor organization.

On April 18, Local 1212 Business Manager Calame protested to CBS Vice-President Fitts, who was in charge of labor relations, and threatened "trouble" if CBS insisted on assigning the work to Local 1. At about the same time, IBEW International Representative Lighty and Local 1212 Business Representative Pantell, who was Calame's assistant, called on Fitts, insisted that Local 1212 was entitled to the work, and again threatened that there would be trouble if the work was done by Local 1212.

In the afternoon of April 21, after the stage hands had carried out CBS's instructions to install the necessary lights for the stage show in the Grand Ballroom, the technicians proceeded to install duplicate lights, without any instructions from CBS. When Local 1212 Representative Pantell was asked why, he replied in the presence of the technicians, "This is an IBEW job. If we don't use our lights we are not doing the show." Later that afternoon, CBS Representative Levin definitely advised Pantell that Local 1 would operate the necessary lights, and ordered the technicians to remove the duplicate lights. Bell, as spokesman for the technicians, refused. Pantell, who was present at the time, then called a meeting of the [fol. 23] technicians to discuss the jurisdictional dispute, and as a result advised the CBS representatives again that if Local 1's lights were used, Local 1212 would not operate the cameras and the necessary incidental equipment even if its duplicate lights were also used. The technicians accordingly refused to complete the installation of the necessary microphones, refused to make pictures, and refused to report for the scheduled rehearsal between 6 and 7 p. m. Unwilling to accede to Local 1212's ultimatum to reassign the work to it, CBS at first ordered its technicians to remove the telecasting equipment, and some of it was in fact

removed. Later, CBS countermanded its order, and instructed the technicians to reset the equipment. However, the technicians refused to do so. Once again at about 10:30 or 11 p. m., CBS Representative Levin asked the technicians to make pictures, and was again refused.

As a result of the foregoing activity by Local 1212, the scheduled program was not telecast.

CONTENTIONS OF THE PARTIES

CBS contends that the disputed work was not covered either by Local 1212's certification or by its agreement, and that Local 1212 was therefore not entitled to strike for the disputed work.

Local 1212, although afforded ample opportunity to file a brief with the Board, did not do so. At the hearing, however, it contended that it had not engaged in a strike, and that in any event the work was covered by its certification or contract.

[fol. 24] Local 1 has not been charged with any violation of the Act, and makes no contention that it was entitled to the work except by virtue of CBS's assignment in this instance.

APPLICABILITY OF THE STATUTE

Based on the foregoing evidence, we find reasonable cause to believe (1) that Local 1212 engaged in, and induced and encouraged CBS employees to engage in, a strike or a concerted refusal in the course of their employment to perform services for CBS, with an object of forcing or requiring CBS to assign the disputed work to technicians who are its members rather than to stage hands and other CBS employees who are members of Local 1; and (2) that Local 1212 thereby violated Section 8 (b) (4) (D). We further find that the dispute out of which the charge arose is properly before us for determination under Section 10 (k) of the Act.

MERITS OF THE DISPUTE

It is well established that an employer is free to make work assignments without being subject to strike pressure by a labor organization seeking the work for its members, unless the employer is thereby failing to conform to an

order or certification of the Board, or unless the employer is bound by an agreement to assign the disputed work to the claiming union.⁴ Local 1212 has no such order, and its certification does not include the work of operating lights on remote telecasts.⁵ There remains for consideration [fol. 25] Local 1212's contention that it had a right to the disputed work by virtue of its agreement with CBS. As noted above, however, Local 1212 had demanded that the agreement should assign the disputed work to it, but CBS did not yield to this demand, and the agreement was silent on the point as a consequence. Local 1212 has thus failed to establish any contractual right to the disputed work.

We therefore find that Local 1212 is not entitled, by means proscribed by Section 8 (b) (4) (D), to force or require CBS to assign the disputed work to its members. However, we are not by this action to be regarded as "assigning" the work in question to Local 1, as we are not called upon to pass on that question.

DETERMINATION OF DISPUTE

On the basis of the foregoing findings of fact and the entire record in this case, the Board makes the following Determination of Dispute, pursuant to Section 10 (k) of the Act:

1. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, and its agents are not and have not been entitled, by means proscribed by Section 8 (b) (4) (D) of the Act, to force or require Columbia Broadcasting System, Inc., to assign the work of setting up and operating lighting equipment on remote telecasts to its members rather than to other CBS employees, who are members of Theatrical Protective Union No. One, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

⁴ *Local 16, etc. (Denali-McCray Construction Company)*; 118 NLRB No. 12.

⁵ The certification expressly excludes "lighting directors and special visual effects employees in New York City."

[fol. 26] 2. Within ten (10) days from the date of this Decision and Determination of Dispute, Local 1212 shall notify the Regional Director for the Second Region, in writing, whether or not it will refrain from forcing or requiring CBS, by means proscribed by Section 8 (b) (4) (D) of the Act, to assign the disputed work to its members rather than to other employees of CBS, who are members of Theatrical Protective Union No. One.

Dated, Washington, D. C. Nov. 25, 1957.

Boyd Leedom, Chairman; Stephen S. Bean, Member;
Joseph Alton Jenkins, Member; National Labor
Relations Board. (Seal.)

[fol. 27] BEFORE THE NATIONAL LABOR RELATIONS BOARD,
SECOND REGION

**Stenographic Transcript of Testimony at Hearing of
June 24, 1957**

485 Madison Avenue,
New York, N. Y.,
June 24, 1957.

Met, pursuant to adjournment, at 9:30 a. m.

Before I. L. Broadwin, Hearing Officer

APPEARANCES:

McGoldrick, Dannett, Horowitz & Golub, Esqs., By: Emanuel Dannett, Esq. and E. Thayer Drake, Esq., Of Counsel, 3 East 54th Street, New York, N. Y., appearing on behalf of Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

Spivak & Kantor, Esqs., By: Harold P. Spivak, Esq., Of Counsel, 225 Broadway, New York, N. Y., appearing [fol. 28] on behalf of Theatrical Protective Union No. 1, IATSE, Intervenor.

Schoenwald, Silagi & Seiser, By: Robert Silagi, Esq., Of Counsel, 745 Fifth Avenue, New York, N. Y., appearing

on behalf of Radio & Television Broadcast Engineers Union, Local 1212, IBEW, AFL-CIO.

PROCEEDINGS

WILLIAM C. FITTS, JR., called as a witness on behalf of the Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Hearing Officer: State your full name.

The Witness: William C. Fitts, Jr.

Hearing Officer: Please state your address.

The Witness: My business address is 485 Madison Avenue, New York.

Direct Examination

By Mr. Dannett:

Q. Mr. Fitts, are you employed by Columbia Broadcasting System, Inc.?

A. I am.

Q. How long have you been so employed?

A. I have been employed by CBS since 1950.

Q. In what capacity are you presently employed?

A. I am vice president in charge of labor relations.

Q. Can you define a remote program for us?

A. Well, the way we use it, a remote origination is any origination which originates outside of a regular television theatre or studio.

[fol. 29] By Mr. Dannett:

Q. Mr. Fitts, were you at some time during the month of April informed that a question had arisen with respect to the assignment of remote lighting work on the "Tony" Awards program?

A. Yes, I was.

Q. Who spoke to you in this connection?

A. The first word I had of this was on April 9th, with Mr. Bates, my assistant, who reported to me a telephone conversation he had had with Mr. Raymond, the head of the stage and studio operation, in which Mr. Raymond had gone over the facts of this proposed broadcast with him. When Mr. Bates reported it to me, it seemed to me that this was the type of case that usually constituted a problem based on past history.

I called Mr. Raymond immediately to get the information from him as to what was involved, the elements of the program. He gave me that information. I then called Mr. Charles Calame, Business Manager of Local 1212, IBEW.

Hearing Officer: What was the date?

The Witness: That is April 9th, the telephone call.

Hearing Officer: To Mr. Calame?

The Witness: Yes.

Q. Will you continue, please?

A. I told him the facts as I understood them. I told him that under those facts I felt that the assignment would have to be made to Local on the lighting. He asked me to put that in writing.

On April 10th, I wrote him a letter confirming the telephone conversation.

Hearing Officer: May we have the letter, please? Mark this letter for identification as Employers' Exhibit No. 3. [fol. 30] (Thereupon, the document above referred to was marked Employer's Exhibit No. 3 for identification.)

Hearing Officer: This paper marked Employer's Exhibit No. 3, is that a true copy of the letter which you wrote?

The Witness: It is.

Hearing Officer: On April 10th, to Mr. Calame?

The Witness: It is.

Hearing Officer: And what is Mr. Calame's title?

The Witness: Business Manager of Local 1212, IBEW.

Hearing Officer: Do you offer it in evidence?

Mr. Dannett: Yes, sir.

The Witness: I wanted to add that on April 9th, after my telephone conversation with Mr. Raymond and with Mr. Calame, I then told Mr. Raymond that the decision was to assign the work of lighting on this origination to Local

No. 1 and to go ahead and make his arrangements to that end.

I also, either on April 9th or 10th, called Mr. Orville Sather, manager of technical operations, and told him what the facts were and what the decision on assignment was, and asked him to make it clear throughout his organization that this assignment had been made to Local No. 1.

By Mr. Dannett:

Q. Mr. Fitts, in your telephone conversation on April 9th with Mr. Calame, you stated that you described the program to him.

Would you please tell us what you did say in that connection?

A. I told him that it was my understanding that [fol. 31] this program was being put on by the American Theatre Wing in the Grand Ballroom of the Waldorf; that they were using the stage there; that on the stage they were going to have some singing acts interspersed in the award ceremonies as the ceremonies went on; that they were going to have a master of ceremonies on the stage conducting the entire proceedings; that they were calling up to the stage the recipients of the various awards; that it was going to be necessary to light the stage itself and, in addition, it would be necessary to have side lights. Also, there would have to be follow spots, both to follow the acts and to follow the recipients of the awards on my understanding of the facts.

I also told him that it was my understanding that the American Theatre Wing had some preliminary conversations with representatives of Local No. 1 about the work in and around the stage and had already made some commitments to the effect that they would have to have some stagehands there, in any event.

That was the substance. And I told him that on those facts, trying to follow the general criteria that we had used in the past, we felt this assignment should be made to Local No. 1.

Q. Who is Mr. Calame?

A. I think I stated that he was Business Manager of Local 1212, IBEW.

Mr. Dannett: May we have a stipulation to that effect?

Mr. Silagi: Yes.

Mr. Dannett: And may we have a stipulation with respect to Mr. Robert Pantell at this time?

[fol. 32] Mr. Silagi: He is Business Representative of Local 1212.

Hearing Officer: Pantell is an assistant to Calame, is he not?

Mrs. Silagi: Yes; in effect.

Hearing Officer: They operate together?

Mr. Silagi: Yes.

By Mr. Dannett:

Q. Did you inform Mr. Raymond of the decision that you had reached?

A. I stated that I did, Mr. Dannett. I stated that I informed Mr. Raymond and Mr. Sather.

Mr. Spivak: Does the record show the title of Mr. Sather?

The Witness: Yes; I stated that he is manager of technical operations.

Q. When did you next hear from Mr. Calame or from any other union representative regarding your conversation of April 9th or your letter of April 10th?

A. The next I heard about this situation was on the Thursday before Easter, which I believe was April 18th. On that day I had a telephone call from Mr. Calame. He stated to me that this matter of the lighting assignment had caused a great deal of difficulty among his own men; that they didn't agree with the conclusion we had reached; that if we insisted on this, there would be trouble; that I better reconsider.

Q. What did you state, Mr. Fitts?

A. I told him that I thought the assignment had been made correctly. In any event, it had been made; that it was too late to do anything about it at that time; that I was

always glad to discuss any question and would discuss it, and that was the end of the conversation.

[fol. 33] That afternoon, Orville Sather called me and told me that he was hearing rumors of trouble over this assignment.

Hearing Officer: Who is Orville Sather?

The Witness: He is manager of technical operations.

I told him that the assignment remained as I had made it to Local No. 1. There would be no change in it; that I anticipated that I would probably have further conversations on Friday and would call him on Friday.

Also, on April 18th, after my conversation with Mr. Calame, I called the International office.

Q. The International office of the IBEW?

A. Yes; and I spoke to Al Hardy, who is the International representative who is in charge of the broadcast locals of IBEW. He is in Washington. I called him and told him what the situation was. I told him I anticipated trouble.

Q. What did Mr. Hardy say?

A. Mr. Hardy called me back later in the afternoon, after my first conversation, and told me that he would ask Mr. Russ Lighty, who is a representative of the International office in this area. He would ask Mr. Russ Lighty to meet with Mr. Calame that afternoon or that night, and that I would be hearing from them the next day, which was Friday.

Mr. Dannett: May it be stipulated that Mr. Ross Lighty is the IBEW International representative in this area?

Mr. Silagi: Yes, he is one of them.

Q. Did Mr. Lighty come to your office the following day?

A. On Friday, the 19th, Mr. Lighty and Mr. Pantell came to my office, yes.

[fol. 34] Q. Who else was present at that time?

A. Mr. Raymond.

Q. Please tell us of the conversation which ensued at that time?

A. In substance, it was that I first tried to review the past history of assignments, the way we had tried to make them.

I tried to explain to them why I had thought this assignment had to be made the way it was made.

They disagreed throughout. They said they didn't believe this; they didn't agree with it. They thought it was their work and insisted it was their work. Toward the end of the discussion, Bob Pantell did say that whatever lighting was done in connection with the television broadcast would have to be done by Local 1212, or else there would be trouble.

The conclusion of it was that I said I disagreed with them. I couldn't agree with their position and they went out.

Q. Did you thereupon send a telegram to Mr. Hardy?

A. I did.

Mr. Dannett: I would like to offer in evidence a telegram from Mr. William C. Fitts to Mr. Albert O. Hardy dated April 19, 1957.

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The Witness: At about the same time that I sent this telegram, I again talked to Orville Sather on the telephone and told him of this conference that morning. I told him that the assignment remained as it had been made to Local No. 1, told him that I anticipated there would be difficulty at the Waldorf, and asked him to be sure to assign an engineer in [fol. 35] charge who could be at the Waldorf and see that the proper orders were issued for the performance of the work by the technical crew.

Also, that afternoon I made several efforts to reach Mr. Calame and didn't succeed. I also tried to reach Al Hardy again on the telephone before I sent the wire.

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Q. To the best of your knowledge, does Local 1212 still adhere to the position that with respect to programs similar to the Tony Award program, it has a right to do the lighting work?

A. They have so stated, that this is their position: With respect to programs of this nature, it is their jurisdiction.

Q. And that they would refuse to allow any engineers to perform any work on such programs unless the lighting work was given to them?

A. This is what I have understood them to say, yes.

Re-Direct Examination.

By Mr. Dannett:

Q. I think you testified that in the negotiations which led to the making of Board's Exhibit No. 2, IBEW made a demand for revision of the agreement with respect to remote lighting?

A. That's correct.

Q. I show you Company's Exhibit No. 1 for identification and ask you whether or not this is a copy of part of the demands made upon CBS in that negotiation?

A. Yes, it is.

Mr. Dannett: I offer this copy in evidence.

Hearing Officer: Have you a copy of it?

Mr. Dannett: They received it at the last hearing, Mr.

Hearing Officer.

[fol. 36] Hearing Officer: Is there any objection?

Mr. Spivak: No objection. The interlineations are not part of the original?

Mr. Dannett: No, they are not part of the original, nor are the notations on the side.

Mr. Spivak: I meant the notations.

Mr. Dannett: That is correct.

Hearing Officer: These proposed amendments in 1955 were proposed by whom?

The Witness: They were proposed by the negotiating representatives of the IBEW in the national negotiation for the national agreement, which is the exhibit.

By Mr. Dannett:

Q. At the time these proposals were made to you by IBEW, there was in effect an agreement between the company and IBEW, is that correct?

A. That's correct.

By Mr. Dannett:

Q. According to Employer's Exhibit No. 1, the union was seeking an amendment of Section 1.04 by adding the following words: "Set up an operation of field lighting equipment use on field pick-ups and the operation of film projectors, wherever used, for rehearsal purposes."

Was there any discussion in the negotiations which lead to the making of Board's Exhibit No. 2—was there any discussion at that time with respect to the union's proposal?

A. Yes.

Q. Will you tell us about it?

A. These proposals were given to us as we were bargaining across the table and each one of the proposed [fol. 37] changes was discussed in some detail. This was discussed back and forth as one of the union proposals.

Q. To the best of your ability, please summarize the discussion with respect to that particular proposal?

A. Well, the discussion in general was that the union representatives felt they had to have this grant of jurisdiction in this language because of the conflicts that had developed over remote lighting assignments. They insisted they had to have it. My position was that I couldn't give it to them, that another union claimed it and that I was not free to make a commitment where there were conflicting claims. That was the up-shot of it.

Q. Was the proposal accepted?

A. It was not accepted. Section 1.04 as now written in the agreement which is currently in effect does not include this language.

By Mr. Dannett:

Q. Mr. Fitts, were there negotiations with IATSE regarding the making of a new agreement which was to become operative upon the termination of Employer's Exhibit No. 6?

A. Yes, there were such negotiations.

Q. And in the course of those negotiations, were various proposals or demands served upon you by Local No. 1?

A. Yes, they were.

Q. I show you Employer's Exhibit No. 2 for identification and ask you whether this is a copy of the demands served upon you in those negotiations?

A. Yes, this is a correct copy.

Mr. Dannett: I offer in evidence as Employer's Exhibit No. 2 the demands previously marked for identification.

[fol. 38] Hearing Officer: Is there any objection?

Mr. Silagi: No objection.

Mr. Spivak: No objection.

Hearing Officer. They will be received in evidence as Employer's Exhibit No. 2.

(Thereupon, the document previously marked Employer's Exhibit No. 2 was received in evidence.)

By Mr. Dannett:

Q. Mr. Fitts, I observe that under paragraph 1 of these demands, Local No. 1 was asking that the agreement cover work—and I am now quoting—"at such other theaters or premises, including remote spots, locations, etc. in New York City." Was there any discussion in the negotiations with respect to that demand?

A. Yes, there was very lengthy discussion with respect to that.

Q. When did those negotiations take place?

A. These negotiations were interrupted. They started around Thanksgiving or some time in November 1954, before the expiration date of the prior agreement. They were then interrupted because two of the companies in this negotiation—this was an industry negotiation—and two of the companies in this negotiation, NBC and ABC, had a negotiation with NABET on the West Coast. They had a negotiation on the West Coast. They had to interrupt these negotiations for about two months while they took on that negotiation, so we never really finished this agreement until some time in 1955. I guess it was in May.

Q. Will you please tell us, as you best recall it now, what the sessions were with respect to this particular demand?

A. Well, Local No. 1 said this was their jurisdiction. Their contention was that they had the electricians in the

theaters and the television studios, that lighting was lighting, in their words; that this lighting a remote was no different from any other kind of lighting, and that they had to have it written into the contract to give them this jurisdiction, again because of the disputes that had existed over the years on the assignment of this work.

Q. That is, they already had lighting in the studios and now wanted the lighting on remotes?

A. They wanted it specified that this was their jurisdiction, their exclusive jurisdiction on remotes.

Q. What was the company's position?

A. All three companies negotiating jointly here took the position that they could not do this. They could not give exclusive jurisdiction because each of them had a conflicting claim from another union.

Q. As a result of those discussions, was IATSE's proposal accepted or rejected?

A. It was not accepted. It was rejected. The final agreement was written with no change on this point, except you will see that the agreement itself has attached to it a letter under which—

Mr. Silagi: What agreement?

The Witness: The current Local No. 1 agreement.

Mr. Dannett: Intervenor's Exhibit No. 1,

By Mr. Dannett:

Q. Will you continue?

A. Under the letter, the three companies agreed in substance that this question could not be written into the contract; that we would meet in the office of the International President of IATSE and attempt to work out some kind of settlement. Such meetings were held. I think there were two of them subsequent to the discussion of the agreement. The meetings were held. They came to nothing. Again, no agreement could be reached because we could not get the third party to agree even if we could agree, so that was left as it had been before.

[fol. 40] Q. The third party being IBEW in the case of CBS and NABET in the case of NBC and ABC?

A. That right.

Q. What is NABET?

A. National Association of Broadcasting Engineers and Technicians. They represent the technical employees at NBC and ABC.

Q. Similar to the representation of the technical employees by IBEW at CBS?

A. That's correct.

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ALBERT J. RAYMOND, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Hearing Officer: Will you please state your full name and address?

The Witness: Albert J. Raymond, No. 30 Chauncey Avenue, New Rochelle, New York.

Direct Examination.

By Mr. Dannett:

Q. Mr. Raymond, are you employed by the Columbia Broadcasting System, Inc.?

A. I am.

Q. How long have you been so employed?

A. February 7, 1944.

Q. In what capacity are you presently employed?

A. I am manager of staging operations, television.

Q. How long have you been acting in that capacity?

A. About five years.

Q. As manager of staging operations, what are your duties, in general?

A. Well, the overall management of theatres and studios as it affects the physical setting of shows; also, supervise [fol. 41] the scenic designers, scenic construction, wardrobe, makeup, trucking, special effects and lighting.

Q. How many persons are under your direct or indirect supervision?

A. Approximately 700.

Q. Were you informed in April that there was to be a telecast of the "Tony" Awards program?

A. Yes, I was.

Q. Was this to be a commercial program?

A. That's correct.

Q. Where was the telecast of this program to take place?

A. In the Grand Ballroom of the Waldorf-Astoria.

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Q. When was this program scheduled to be telecast?

A. April 21st, from 11:15 p. m. to 12 midnight.

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Q. Did you have a conversation with Mr. Fitts with respect to who was to do the lighting on that program?

A. Several conversations with him.

Q. When was the first of those conversations?

A. Approximately April 9th, when I was told by Mr. Gallagher we were going to do the show. I discussed it then.

Q. Will you briefly state what Mr. Fitts told you was to be done with respect to the assignment of employees to handle the lighting?

A. Briefly, I told Mr. Fitts what I have just said about the setup here. I explained what we were going to do over there. Mr. Fitts told me that this was a job—the lighting was to be done by IATSE.

Q. Having been so informed, what did you do?

A. I called John Goodson, one of the Business Agents from Local 1, IATSE, and told him that I would need the men on April 21st, at 9 a. m.

[fol. 42] Q. How many stagehands did you request?

A. I requested eight men.

Q. What was the next date on which you had any conversation with anyone with respect to the assignment of the lighting work on the "Tony" Awards program?

A. It was on a Thursday prior to the show. Mr. Fitts called me and asked me to attend a meeting on Friday in his office with the representatives of the IBEW.

Q. That would be April 19th? The meeting was to be held on April 19th?

A. Right.

Q. Did you attend such a meeting in Mr. Fitts' office?

A. I did.

Q. Will you briefly describe what happened then?

A. Mr. Lighty of the International and Mr. Pantell took exception to the assignment of the work to IATSE. Mr. Fitts went into considerable detail in explaining the reasons why he assigned it to IATSE. They, however, took exception to it all the way through, and the final part of the meeting they said they would not go along with IATSE lighting, or something to that effect.

Q. Coming down to April 21st, did you go to the Waldorf-Astoria on that day?

A. I did.

Q. About what time did you arrive?

A. About 1:30 p. m.

Q. With whom were you at the time?

A. I was with Mr. Emmons and Mr. Bates.

Q. And Mr. Emmons is your assistant, is he?

A. Well, he is manager of theatre and stage operations, reporting to me.

Q. And Mr. Bates has been testified to as being—

A. The assistant director of labor relations.

Q. At that time, did you observe anything with respect [fol. 43] to the installation of supplemental lights for the show?

A. Well, immediately upon arrival, the first thing I did was to check the work that we had assigned to the stagehands. I found that they had installed all the lights as per instructions of the lighting director. They had the lights in place and ready to go.

Q. How many stagehands were there, if you know?

A. There were eight stagehands.

Q. On that day?

A. That's right.

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Q. Did you see any members of the IBEW technical crew arriving?

A. Yes, I did, about 2:30, in that neighborhood.

Q. Did you observe anything with respect to the installation of lights by the IBEW crew?

A. That's right. Some place about four o'clock, I was scanning around the room. I noticed that next to each

camera they had installed follow spots and they also installed one large one on the second tier, in the center of the auditorium.

Hearing Officer: Had there been lights installed there before they installed theirs?

The Witness: The lights by the IATSE people.

Hearing Officer: Had been there.

The Witness: Yes.

Hearing Officer: And they followed and installed additional lights?

The Witness: That's correct.

Q. How many cameras were there?

A: Three cameras, to my knowledge.

Q. And these lights were installed close by the cameras; is that right?

[fol. 44] A. Next to two of the cameras, and the third camera had a 5000-watt above it on the next tier, installed by IBEW.

Hearing Officer: But lights had already been installed. They simply duplicated the lights?

The Witness: They brought in additional supplemental lighting of their own over and above what was put in by IATSE.

Hearing Officer: Was it necessary to have these additional lights that they brought in?

The Witness: No, sir.

Q. Did you speak to anyone concerning the lights installed by Local 1212 members?

A. Yes; Mr. Levin was engineer in charge. He had not arrived at this point. I proceeded to the second balcony, where they were setting up the control room. I spoke to Mr. Pantell, who happened to be up there with the technical crew. I said, "What are you fellows installing lights for," or something like this.

He said, "This is an IBEW job. If we don't use our lights, we are not doing the show."

Q. Was anyone else present at the time you had that conversation with Mr. Pantell?

A. I believe Mr. Emmons was with me and other members of the technical crew. I know Sandy Bell was there. He was the technical crew chief.

Q. And he is a member of the IBEW, a member of Local 1212?

A. Right.

Hearing Officer: What was meant by their statement that if they don't handle the lights, they won't do the show? What was meant by "doing the show"?

The Witness: They wouldn't use the cameras.

Hearing Officer: They wouldn't operate the cameras; is that right?

[fol. 45] The Witness: That's the word, yes, sir.

Hearing Officer: Is there anything else there they were to do?

The Witness: Well, they have to operate all the attendant gear that goes with it, the switches and all that.

Hearing Officer. How many men did they have there?

The Witness: I am not sure, but at least ten men.

Q. Did you subsequently have a conversation with Mr. Sam Levin with respect to the installation of the lights?

A. Yes.

Q. Who is Mr. Levin?

A. He was engineer in charge for CBS.

Q. A management representative; is that correct?

A. Yes.

Q. And did he then give any orders to Mr. Bell in your presence?

A. Yes, he did.

Q. Please tell us about that.

Hearing Officer: Who is Mr. Bell?

Mr. Dannett: That is the Sandy Bell, a technical crew chief, who was a member of the IBEW, Local 1212.

Hearing Officer: Look at Board's Exhibit No. 4 for identification.

What does it represent?

The Witness: To my knowledge, this represents the IBEW technical crew that was there.

Hearing Officer: Those were employees of CBS?

The Witness: That's correct.

[fol. 46] By Mr. Dainnett:

Q. I believe you testified that you were present when Mr. Levin gave instructions with respect to the lights; is that correct?

A. That's right.

Q. About what time was it?

A. About 5:15.

Q. And I think you testified he gave orders to Sandy Bell?

A. He gave orders to Bell to remove the lights, the IBEW lights.

Q. What did Mr. Bell reply, or what did anyone else reply?

A. Mr. Bell refused to remove the lights.

Q. What did he say?

A. Well, he stated that he would not remove the lights.

Hearing Officer: And Bell was an IBEW member?

The Witness: Yes, sir.

Hearing Officer: A member of Local 1212?

The Witness: Yes, sir.

Hearing Officer: You may continue.

Q. Was Mr. Pantell present at that time?

A. Yes, Mr. Pantell was present.

Q. What did Mr. Pantell state, if anything?

A. Mr. Pantell called a meeting of the boys down at the other end of the room. The technical IBEW boys available. They were gone about five minutes and they returned and Mr. Pantell said, "Unless we use IBEW lights, we will not do the show."

Hearing Officer: That is, they will not operate the cameras and the incidental equipment that went with the cameras?

The Witness: That's right.

Hearing Officer: Unless they did the lighting?

The Witness: That's right.

Q. Was there any request at this time, or at any other time while you were present, to Mr. Bell that pictures be [fol. 47] made?

A. Yes, at one point they asked Mr. Bell to make pictures, and again Mr. Pantell injected himself into the picture and refused to allow Mr. Bell to do it.

Mr. Silagi: Will you identify the "they."

The Witness: It was Sam Levin.

Q. Sam Levin asked that pictures be made. Mr. Bell stated they would not do it?

A. That's right.

Q. Did you hear Mr. Bell make any request with regard to completing the setup of equipment?

A. Yes. Mr. Levin requested Mr. Bell to complete the setup. Again, Mr. Bell refused to do it.

Q. Do you know what equipment had not been set up at the time you speak of?

A. Being at the technical department, I was advised there were microphones missing from the orchestra area.

Q. About what time was this?

A. Around 5:30 now, 5:20.

Hearing Officer: As this conversation or exchange went on, were the men in this technical crew present and did they hear what was said between Mr. Pantell and Mr. Levin?

The Witness: Yes, sir.

Hearing Officer: And Mr. Bell?

The Witness: Yes, sir.

Hearing Officer: They stood right there?

The Witness: Yes.

Hearing Officer: All bunched together?

The Witness: The majority. It looked like about eight or ten men standing around. I would say the majority were there.

[fol. 48]. Q. What happened after this, Mr. Raymond?

A. After this refusal to take the pictures and continue with the setup?

Q. Yes.

A. At approximately 6 p. m. the crew went out for dinner.

Q. Prior to that time, had there been any suggestion that the show be lighted by both IATSE and BEW?

A. I believe there were several suggestions, one by my-

self, where I asked Mr. Pantell—I said, “This show has been sold and there is prestige. Why not do it together, using the IA lights and the IBEW lights?”

He said, “Positively no. Unless we light it, we are not going to operate the cameras.”

Q. Do you know whether there was a rehearsal of this program scheduled for the 21st?

A. Yes; 6 to 7 p. m.

Q. Did such a rehearsal take place?

A. No. The refusal of the work had came up and the boys had broke for dinner at this point when the rehearsal should have been going on.

Q. The members of IBEW were required to man the cameras and to handle the technical equipment in order that the rehearsal take place; is that correct?

A. That's correct.

Q. The rehearsal didn't take place?

A. No.

Q. Where were the men between the hours of 6 and 7 o'clock, if you know?

A. At dinner.

Q. And who instructed them to go to dinner?

A. Well, I thought Mr. Pantell instructed them.

Mr. Silagi: I have to strike it.

Hearing Officer: Strike it out. Do you know or don't you know?

The Witness: I am not sure, sir.

[fol. 49] Q. Do you know at approximately what time the men returned from dinner?

A. At 7 a.m.

Q. At that time, were there any further conversations with respect to the lighting?

A. Yes.

Q. Will you tell us about that?

A. Down in Box No. 1 Mr. Pantell, Mr. Bates and Mr. Levin and myself had a discussion about making pictures and going on with the show. Again, Mr. Pantell refused to allow the boys to make pictures or continue with the setup while the IATSE lights were going to be used.

Hearing Officer: What do you mean by making pictures?

The Witness: Pan around the room and just pick it up as it exists so that you could see it on a monitor.

Hearing Officer: That was part of the rehearsal, part of the preparations for the real show?

The Witness: They call it warming up the gear.

Hearing Officer: So that they would be all ready?

The Witness: That's right. We just like to see the pictures as they exist.

Q. Following that conversation, was there any further instruction given to the IBEW crew with respect to the removal of all of their equipment from the premises?

A. That's correct. In the presence of Mr. Pantell and Mr. Bates, Mr. Levin and myself, Mr. Bates made another attempt to operate the show with the IATSE lights and again there was a refusal.

Hearing Officer: By whom?

The Witness: By the IBEW, Mr. Pantell, to allow the crew to continue with the setup or to operate the cameras. At this point, Mr. Bates decided, as long as we are not getting any place on the discussion and there was a definite [fol. 50] "No," that the technical crew should strike the gear and get ready to remove it from the auditorium.

Mr. Silagi: May we have a time on this, please?

The Witness: Some place after 7, probably 7:30.

Q. And instructions were then given by Mr. Levin to that effect?

A. That's right. He gave Mr. Bell, the crew chief, instructions to remove the gear.

Q. What then took place?

A. Mr. Sam Digges, general manager of WCBS television, came up to us. Mr. Digges was very upshot. He had his show sold to Pepsi-Cola Bottlers.

He said, "At least leave the gear stand until air time, that we are showing good faith that we are trying to get the show on to the client."

With that, Mr. Levin gave instructions to the crew not to break down any further.

Q. Were any instructions given at that time to reset the equipment and make pictures?

A. Mr. Levin gave them instructions to reset the equipment.

Q. And what happened with respect to that instruction? Was it carried out?

A. There was a limited amount of work done in breaking it down, but they refused to continue to reset it back to where it was.

Q. Was this program telecast on the night of April 21st?

A. No, it was not.

Mr. Dannett: That is all I have.

Cross examination.

By Mr. Spivak:

Q. . . .

Did Mr. Pantell ever say, in the presence of other members of the IBEW crew, that he would refuse to continue [fol. 51] to let them operate unless IBEW operated the lights?

A. Yes; but I have so testified to that.

Q. On how many occasions did he actually say that?

A. Well, it was going on all night, but I would say three or four good firm ones.

Q. Were there other members of the IBEW crew in his presence at the time he made those statements?

A. Yes, I so stated that.

Q. Did Mr. Levin ever say to the technicians who were present that if they didn't perform as they were instructed, disciplinary action would be taken against them?

A. He told that to Mr. Bell, yes.

Q. What did Mr. Bell answer?

A. He shrugged his shoulders.

Q. Did he actually carry out the instructions issued to him?

A. No, he did not.

Hearing Officer: By "he" you mean whom?

Mr. Spivak: Sandy Bell.

Hearing Officer: And those instructions were what?

The Witness: To make pictures of the setup.

Hearing Officer: And they didn't do it?

The Witness: No, sir.

Hearing Officer: They were all there and the equipment was there and they didn't do what they were told to do?

The Witness: That's correct.

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[fol. 52] ROBERT PANTELL, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Hearing Officer: Please state your full name and address.

The Witness: Robert Pantell, No. 4 Terrace Circle, Great Neck, New York.

Direct examination.

By Mr. Dannett:

Q. I believe the testimony is that you are the Business Manager of Local 1212.

A. No, sir, I am the Business Representative of Local 1212.

Q. And you are an assistant to Mr. Calame?

A. In effect; yes.

Q. And Mr. Calame's full title is what?

A. Business Manager.

Q. Were you at the Waldorf-Astoria on April 21st?

A. Yes, sir.

Q. And you were in the Grand Ballroom on that date?

A. Yes, sir.

Q. You testified in an action brought in the U. S. District Court for the Southern District of New York by Charles T. Douds, as Regional Director of the Second Region of the National Labor Relations Board, on behalf of the National Labor Relations Board as petitioner, against: Radio & Television Broadcast Engineers Union, etc., as respondent; is that right?

A. Yes, sir.

Q. And you so testified on June 21, 1957; is that not correct?

A. Yes, sir.

Q. I would like to read to you questions and your answers which were given at that hearing:

[fol. 53] "Q. When for the first time did you speak to any representative of CBS?

A. The first conversation I had with a representative of CBS was when Mr. Levin arrived on the scene. At that time Mr. Raymond instructed Mr. Levin to instruct Mr. Bell to have the technicians remove the technicians' lighting equipment, that the IATSE was going to operate the lights for the television show."

Do you remember that question and answer?

A. Yes, I do.

Q. Is the answer correct?

A. Absolutely, I believe.

Q. I read the following questions and answers:

"Q. Were you present when this was said?

A. Yes, I was.

Q. Did you make any reply?

A. The first thing I did was to gather the crew of technicians in sort of an impromptu meeting at which we discussed the situation. We finished our meeting, at which we talked about the work jurisdiction, whether stagehands or technicians. We returned to where Mr. Levin and Mr. Raymond and several other CBS officials were standing, and I informed them that we were ready, willing and able and eager, I might add, to do our job, but to do the complete job, which encompassed also the lighting of the program. I also told him if we could not do the whole job, we couldn't see how we could do any of it."

Do you remember those questions and answers?

A. I do.

Q. And were those answers correct?

A. They are.

Q. I will continue reading:

[fol. 54] "Q. At what time did that happen?

A. This, I would say, was roughly in the vicinity of 4 or 4:15.

Q. Were there any further conversations with CBS representatives subsequent to this?

A. Well, when I told this to Mr. Levin, he instructed Mr. Bell directly to prepare the broadcast and also to remove the lights, to remove the technicians' lights, that is; at this time, I repeated the same statement: that we would do the job completely, but if we couldn't do it completely we wouldn't do any of it.

The Court: You were authorized by the other men there for your union to say that they would refuse to work?

The Witness: Yes, sir."

Do you remember those questions and testifying in the manner that I just read to you?

A. Yes.

Q. And is the testimony correct?

A. It is.

Q. And the answers given were correct?

A. Right.

Q. I would like to read some additional questions and answers. In this case the questions are by the Court:

"Q. When you said if the members of your union couldn't do the lighting and then they couldn't do any of the work, was that designed to get the work of lighting for the members of your union?

A. It was designed to protect the jurisdiction of our members, yes.

Q. Was that designed to have the work assigned to the members of your union?

A. Yes.

Q. You were making that threat that they would not do the rest of the work in order to get the work assigned to members of your union?

A. Yes, your Honor."

[fol. 55] Do you recall the questions and do you recall so testifying?

A. I do.

Q. And are the answers given correct?

A. Yes, they are.

Q. Now, I will continue reading from the Court's questions and your answers:

"Q. Did you advise the members of your union that in that event they were not to handle any of the camera work, in that event they didn't do the lighting?

A. Your Honor, when CBS first indicated, by ordering our technical director to remove the lights, that the lighting was going to be assigned to IATSE, we met in a sort of a caucus and among the 11 or 12 of us present, in full cognizance of the lighting dispute, we knew that this—let me put it this way—we felt this was a breach in our jurisdiction and was injurious to the protection of our work. We also agreed that whatever steps would be taken would be proper and fitting to protect our members.

Q. You agreed you would tell the employer that you wouldn't handle any of the work unless you could handle the lighting; is that right?

A. Yes, sir.

Q. What I was interested in, was that something decided by the men there or did you as Business Representative tell them that that is what they were to do?

A. For the purpose of the Waldorf, that was decided by all of us.

Q. Including you?

A. Yes."

Do you recall so testifying?

A. Yes, sir.

Q. And are the answers given correct?

A. Yes, sir.

[fol. 56] Re-direct examination.

By Mr. Dannett:

Q. Did you at any time on April 21st recede from your position that you wouldn't go on with the telecast if IATSE lights were used?

A. No.

Hearing Officer: You do recall, don't you, that Levin instructed Bell to remove something, or to have it removed; is that it?

The Witness: Yes, sir.

Hearing Officer: You were there and you heard that?

The Witness: Yes, sir.

Hearing Officer: Do you recall what you did about those instructions from Levin to Bell?

The Witness: I told Mr. Levin that we—

Hearing Officer: Bell was right there.

The Witness: Bell was present.

Hearing Officer: You told him what?

The Witness: I told Mr. Levin that we would be glad—that we would do our work, what we considered our work, the entire work, including the supplementary lighting necessary.

Hearing Officer: But what about the removal of the equipment, of the lighting, the lighting that the technicians installed, that Levin told Bell to have removed?

The Witness: I told Mr. Levin that we could not remove our lights.

Hearing Officer: You told Mr. Levin?

The Witness: That's right.

Hearing Officer: And so Mr. Bell didn't instruct the people to remove them?

[fol. 57] The Witness: That's correct.

Hearing Officer: You stood right there and heard this?

The Witness: Right.

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CARL PRINCE was called as a witness on behalf of Columbia Broadcasting System, and being first duly sworn, testified as follows:

Hearing Officer: Please state your full name and address?

The Witness: Carl Prince, No. 84 Remsen Road, Yonkers, New York.

Direct examination.

By Mr. Dannett:

Q. Mr. Prince, are you employed by Columbia Broadcasting System, Inc.?

A. Yes, sir.

Q. How long have you been so employed?

A. Since December of 1950.

Q. In what capacity are you now employed?

A. As a technician.

Q. And you are a member of Local 1212?

A. That's right.

Q. Of the IBEW?

A. Yes, sir.

Q. Were you assigned to be a cameraman on the "Tony" Awards program?

A. Yes, sir, I was assigned to that program.

Q. And you were to act as a cameraman?

A. For the purpose of program time, I was to operate a camera. However, prior to that, during the set-up time of the show, my activities are not limited to just camera setup.

[fol. 58] Q. But on the actual program time, you would have handled one of the cameras?

A. Yes, sir.

Q. Are you also a representative of Local 1212?

A. As an assistant to the business manager, I am.

Hearing Officer: The business manager being who?

The Witness: Mr. Calame.

Q. You testified in an action brought in the United States District Court for the Southern District of New York by Charles T. Douds, against Radio and Television Broadcasting Engineers Union, et cetara?

A. Yes, sir.

Q. You so testified on June 21, 1957?

A. It was this past Friday, if that was the date.

Q. I would like to read to you from your testimony and I would like to ask you whether the testimony which you there gave is correct.

I am now reading from the questions asked by the Court, as follows:

"Question: Let me ask you, sir, you were planning on being one of the cameramen that night; is that right?

Answer: That's correct.

Question: Did you ever operate the television camera that night?

Answer: I operated immediately after it was set up, after it was cabled in, to check out the circuits, to be sure it was not defective.

Q. A test run?

Answer: Yes, sir.

Question: Did you ever actually use it to telecast that night?

Answer: You mean to televise the show?

[fol. 59] Question: Yes.

Answer: No, sir."

Do you recall so testifying?

A. Yes, sir.

Q. Are the answers given correct?

A. Yes, sir.

Q. I will continue now with the questions asked by the Court.

"Question: Did you ever have any conversation with anyone as to whether or not you should operate that camera that night?

Answer: Well, we had conversations among the men.

Question: And who were present there, all the crew?

Answer: All the crew? Well, yes, all the crew.

Question: And they were all members of the IBEW?

Answer: That's correct.

Question: Was any determination reached as to whether or not the camera should be used to televise the show?

The Answer: Well we decided that we would televise the show in the event the lighting was not done by IATSE.

Question: But if it was done by the so-called stage-hands union, that you would refuse to operate the cameras; is that right?

Answer: That's right.

Is that testimony as I read it to you accurate?

A. Yes, sir.

Mr. Dannett: No further questions.

[fol. 60] Cross-examination.

By Mr. Silagi:

Q. Mr. Prince, who were the employees of the camera crew assigned to the Waldorf Astoria on April 21, 1957? Could you give us their names and their titles?

Hearing Officer: Well, we have here a list. Maybe he can identify the list.

Mr. Silagi: That is exactly what I would like him to do.

Hearing Officer: Suppose you look at Board's Exhibit No. 4 for identification and tell us what it represents, and then maybe you can tell us who prepared it and its origin, if you can?

Mr. Silagi: First, can you tell us who prepared it?

Hearing Officer: Let him look at that.

The Witness: This appears to be a complete list of the personnel that were present of the technical crew.

By Mr. Silagi:

Q. Do you know who prepared that list?

A. No, sir, I do not.

Hearing Officer: Does that represent the complete list of Crew No. 10, the technicians who were employed by CBS and all of whom were members or are member of IBEW, Local 1212?

The Witness: Well, it is not a list of the members of Crew No. 10. The majority of the men on here are members of Crew No. 10, but there are some extra men that are not normally assigned to that crew.

By Mr. Silagi:

Q. Who are these extra men not normally assigned to Crew No. 10?

A. Mr. Victor Rubi, Mr. John Freda, Mr. Angelo Gaudino, Mr. John Morris, and Mr. Vernon Surphlis.

[fol. 61] Q. Please identify the classification of these five men whose names you have just listed?

A. Well, Mr. Rubi, Mr. Freda and Mr. Gaudino are listed as utility men; Mr. Morris is listed as link transmitter, and Mr. Surphlis is listed as driver.

Q. Is Mr. Surphlis a technician?

A. He is an assistant technician.

Q. What did he do on the particular day in question?

A. Mr. Surphlis drives the CBS vehicle from our production center, from the field shop, to the location of the show, transporting the equipment in that vehicle.

Q. Is this a station wagon or truck?

A. It is a truck, a commercial vehicle.

Q. And he is not normally assigned to Crew No. 10, is he?

A. No, sir.

Q. How about Mr. Morris, link transmitter? What did he do on April 21, 1957?

A. Mr. Morris was a technician that was operating the microwave transmitter which was transmitting the video signal from the Waldorf Astoria to a receiver. I am not sure whether that was located at either Chrysler Tower or Empire State Tower.

Mr. Dannett: Is this witness testifying as to work that was done or work that he was assigned to do? I think he said this is work they were doing.

The Witness: I can testify that I had seen Mr. Morris' equipment set up with the filaments in the tubes hot, the filaments on, indicating that his power was on through the equipment, and I knew that he had checked his signal through with the receiver man.

Hearing Officer: It is conceded that they didn't do the [fol. 62] work in connection with the sending of the program. What work they did was preliminary to setting up, or the setting up of their equipment preparatory.

By Mr. Silagi:

Q. Is this preparatory work necessary to be done in order to put the show on the air?

A. Yes, sir.

Q. Did Mr. Surphlis actually drive the truck which brought the equipment to the Waldorf?

A. Yes, sir.

Hearing Officer: You don't have to go into that.

Mr. Silagi: For Mr. Dannett's benefit.

Stenographic Transcript of Testimony at Hearing of
June 26, 1957

PROCEEDINGS

ORVILLE SATHER, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Hearing Officer: State your full name and address, please.

The Witness: Orville Sather, No. 134 Minell Place, Teaneck, New Jersey.

Direct examination.

By Mr. Dannett:

Q. Mr. Sather, are you an employee of Columbia Broadcasting System, Inc.?

A. Yes, I am.

[fol. 63] Q. How long have you been so employed?

A. A little over 22 years.

Q. In what capacity are you presently employed?

A. I am manager of television technical operations.

Q. In that capacity, are you in charge of all technical operations in the City of New York?

A. Yes, I am, under the direction of Mr. Robert J. Thompson, who is my immediate superior.

By Mr. Dannett:

Q. Mr. Sather, at any time during the month of April did you have any conversation with Mr. Fitts with respect to who was to do the lighting work on the "Tony" Awards program?

A. Yes, I did, on several occasions. The first was about a week and a half prior to the show. I do not know the exact date. Mr. Fitts called me and stated that he had looked into the matter of lighting on the "Tony" Awards program, and that, because of the circumstances involved, it was being assigned to IA.

Hearing Officer: Did he mention what those circumstances were?

The Witness: Yes. He states at that time that there would be stagehands handling scenery and properties, and under those circumstances it would be considered as an IA house. For that reason, IA would be assigned to the lighting.

Q. Following that conversation with Mr. Fitts, did you give any instructions to any of the persons reporting to you?

A. Yes, I did. We have an Executone Intercom system in the building. I immediately called the field shop. I believe that Mr. Vernon Cheeseman answered.

[fol. 64] Q. Who is Mr. Cheeseman?

A. He is supervisor in the television field department.

Q. He is a member of the IBEW?

A. Yes, he is.

Q. Local 1212?

A. Yes.

Q. He is covered by the Local 1212 contract?

A. Yes, he is.

Q. To whom does Mr. Cheeseman report?

A. He reports to Mr. Levin, who in turn reports to Mr. Wilson.

Q. Please tell us what you told Mr. Cheeseman.

A. I told Mr. Cheeseman that Mr. Fitts had called and that the lighting for the "Tony" Awards program was being handled by IA. I think that is about the substance of our conversation.

Q. What is the next date on which you had any conversation with Mr. Fitts regarding lighting, if you recall?

A. The next date was Thursday of the following week, late in the afternoon. I called Mr.—

Q. Pardon me. Is that the Thursday preceding the broadcast, the proposed broadcast?

A. Yes.

Q. That would be April 18th?

A. I believe so, yes.

I called Mr. Fitts and told him that Wilson had advised me that there was some question about whether IA or IBEW was to do the lighting. I asked again for his clarification on it, and Mr. Fitts told me that IA was to do the lighting.

I then immediately instructed or confirmed with Mr. Wilson that it was an IA lighting job.

Q. Following that conversation, did you have any further conversation with respect to the lighting work on the "Tony" Awards program?

A. Yes. Mr. Fitts called me back again the next day, which would have been Friday, the 19th.

[fol. 65] Q. What time of the day was it?

A. I don't recall, but I think it was just before noon. It was around the middle of the day. He advised me that he had conversations with Mr. Calame of the IBEW and that the position of CBS was not changed and the IA was to do the lighting and I was to so instruct Mr. Wilson.

Q. Did you so instruct Mr. Wilson?

A. I did.

Q. Did you have a further conversation with Mr. Wilson or anyone else concerning lighting on the same day?

A. Yes. Later in the afternoon Mr. Wilson happened to be in Mr. Mercier's office, which is adjacent to me. Mr. Giriat, the engineer in charge of studio operations came into Mr. Mercier's office. I also came in at the same time.

Mr. Giriat said that he had been talking to Mr. Bob Pantell at the IBEW office, and Pantell had told him that Local 3 of the IBEW, the local electricians at the Waldorf, would not supply power to IA if IA was to do the lighting.

Mr. Silagi: I am having difficulty in hearing you.

Hearing Officer: Read the last portion.

(Answer read.)

Mr. Silagi: I move to strike this as hearsay.

Hearing Officer: I will let it stand.

Q. Will you continue, please?

A. We then discussed what emergency steps we should take and we decided—I believe I instructed Mr. Wilson that he should have lighting equipment available as well as technicians available to handle the lighting in the event that there should be any trouble at the Waldorf.

Q. Did you in your conversation with Mr. Wilson instruct him that the technicians should do the lighting?

[fol. 66] A. No. I emphasized the point that the lighting

was assigned to IA and the technicians were not to do the lighting.

Q. Did you, in your conversation with Mr. Wilson, instruct him to have lighting equipment brought to the Waldorf by IBEW technicians?

A. No, I don't believe so. As far as I can recall, I recommended to him that he have lighting equipment available, but we did not discuss, as far as I can remember taking it to the Waldorf. It was not intended, at any rate.

SAMUEL LEVIN, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Hearing Officer: Please state your full name and address.

The Witness: Samuel Levin, 218-21 Grand Central Parkway, Queens Village, New York.

Direct examination.

By Mr. Dannett:

Q. Are you employed by Columbia Broadcasting System, Inc.?

A. Yes, sir, I am.

Q. How long have you been so employed?

A. Approximately 14 years.

Q. In what capacity are you presently employed?

A. Engineer in charge of field operations.

Q. And your immediate superior is Mr. Wilson, who has just testified?

A. That's right.

Q. Did you discuss any question concerning lights or lighting with Mr. Sather on the morning of April 21st?

A. Yes, sir, I did.

[fol. 67] Q. Will you please state what that conversation was?

A. I happened to walk into the garage area and I noticed that the truck—

Q. The garage area of what?

A. Of the CBS-TV field shop.

I noticed there were some lights in the truck that had the equipment going over to the Waldorf-Astoria. I had been previously instructed that no lights were to go over to the Waldorf-Astoria, and it was my understanding that no lights should have gone over.

Q. Who gave you those instructions?

A. Mr. Sather.

Q. Proceed, please.

A. I immediately called Mr. Sather at his home and told Mr. Sather that there were lights on the truck and what should I do about it? Mr. Sather instructed me to—well, inasmuch as the lights were already on the truck, that we might as well let them go over to the Waldorf, but they were under no circumstances to be set up in the Waldorf. They were to be stored somewhere in the Waldorf, but not to be set up.

Q. Following that conversation with Mr. Sather, did you have any conversation with any member of the crew assigned to the show?

A. Approximately 2 o'clock that afternoon—

Q. Did you have any conversation with anyone on the truck with respect to the lights?

A. Not to my knowledge, I did not.

Q. Or in the field shop?

A. I had some conversation with someone in the field shop.

Q. What was the conversation?

A. One of the members of the crew came by the shop. I had to pass this information that Mr. Sather gave to me on to someone from the crew, what Mr. Sather's instructions [fol. 68] were. About 2 p.m. or thereabouts, Mr. Hal Hoffman, a member of the crew that had been assigned to the Waldorf-Astoria, came by the shop and I told Mr. Hoffman to pass information on to Mr. Bell, who was the technical director of his crew, that under no circumstances were these lights that were already on the truck to be set up in the Waldorf-Astoria. Mr. Hoffman said he would pass this information on.

Q. Mr. Hoffman was one of the cameramen on that crew?

A. That's correct. He was one of the cameramen.

Q. Did you go to the Waldorf-Astoria that day?

A. Yes, I did.

Q. About what time did you arrive?

A. About 4:45 I arrived at the Waldorf.

Q. Upon your arrival, did you examine the equipment and the installation?

A. Yes. When I got there, the first thing I saw was that the video equipment—the technical equipment, that is—the switcher control, the audio equipment, monitors and talk-back facilities were already set up, that the cameras had been fired. By that I mean that the power had been turned on to the cameras.

As soon as I arrived, I was informed by one of the members of the crew that Mr. Al Raymond wanted to see me. I looked around for Mr. Raymond. They told he was on the ballroom floor.

I immediately went down and saw Mr. Raymond, and he informed me that the IBEW had set up lights, that the IA was objecting to the lights, to the IBEW lights being put on; that Mr. Bates had issued orders to the IBEW to have the lights removed.

This is the first I saw or knew that IBEW lights had been set up, contrary to my instructions to Mr. Hoffman.

[fol. 69] Q. Did you actually see the lights, the IBEW lights?

A. Yes, I did, at this time.

Q. And how many lights were there?

A. I saw three lights, IBEW lights that were set up: one on balcony right, next to the camera, one on balcony left, next to a camera, and one in the second tier center.

Q. Following your conversation with Mr. Raymond, did you have any conversation with any of the Local 1212 representatives?

A. Yes. As soon as I found out what Mr. Raymond wanted me for and I walked up to the second balcony, where the control room was set up, and that was the first time I had seen any lights—this was about three or four minutes after I arrived—this is the first time I saw any IBEW lights set up. I went over to the control area. There were some members of the crew present, and Mr. Pantell. I was looking around for Mr. Bell, who was the technical director.

I informed Mr. Pantell, in passing that I was going to

instruct Sandy Bell to remove the IBEW lights that he had set up, contrary to my instructions.

Q. What did Mr. Pantell state?

A. Mr. Pantell said that if the IBEW 1212 lights were removed, there would be no show. About this time Mr. Bell appeared, and I instructed Mr. Bell to remove the IBEW lights. Mr. Bell just shrugged and did not say anything. Mr. Pantell interjected something here and said, "It is either 1212 or no show."

Again, I instructed Mr. Bell to remove the IBEW lights. Again Mr. Bell just shrugged his shoulders.

Q. Did you at this time give any instructions with respect to the installation of equipment or the completion of installation of equipment?

[fol. 70] A. It was about this time that I asked Mr. Bell how much further equipment he had to set up. Mr. Bell informed me that he had one or two other microphones to set up in the orchestra, which would complete his setup.

Q. Did you instruct him to complete the installation of the microphones?

A. Yes, I did.

Q. What did you say?

A. I told Mr. Bell to complete the setup, including the two microphones which he said were not installed in the orchestra. Mr. Bell refused by a shrug of his shoulders.

Q. Who was present at the time you gave these instructions, in addition to Mr. Bell and Mr. Pantell, if any other persons were present?

A: Well, since this was in the control area, there was the audio man present, Mr. Fairman, Mr. Hanford, who was a video control operator or technician, Mr. Scannapieco, who is also a video control technician, and perhaps one or two other men, members of the crew.

Also present were Mr. Raymond, Mr. Pete Emmons and Mr. Hal Sobolov.

Q. Who is Mr. Sobolov?

A. I understand Mr. Sobolov has a title similar to— I don't know his exact title. I believe it is studio manager.

Q. Following the refusal to complete the setup of equipment, were there any other conversations with Mr. Bell or Mr. Pantell with respect to lighting?

A. Yes. About 5:15, I phoned Mr. Bates and told him

that Mr. Bell was refusing to remove the IBEW lights as per instructions. I asked Mr. Bates what I should do.

Mr. Bates informed me that I could offer a compromise agreement to Mr. Pantell to have both IBEW lights and [fol. 71] IA lights used on the show. I went back to Mr. Pantell and offered this compromise agreement to him.

Mr. Pantell at first said he could not go along with this compromise, but he would like to make a phone call. He returned in a few moments and said that there could be no compromise. It was either 1212 doing the lighting or no lighting at all.

Q. That last conversation was about what time?

A. Between 5:15 and 5:45.

Q. Was there a rehearsal scheduled to be held that day?

A. Yes, sir.

Q. What time?

A. There was supposed to be a camera rehearsal between 6 and 7 p.m.

Q. And was there an audio rehearsal to be held that day?

A. I think there was supposed to be an audio rehearsal between 5:30 and 6 p.m.

Q. Did either of those rehearsals take place?

A. No, sir, no rehearsal took place.

Q. Following Mr. Pantell's refusal to accept a compromise, did you give any further instructions to Mr. Bell?

A. Yes. When Mr. Pantell told me that he would not go along with the compromise, I again addressed Mr. Bell and instructed him to remove the IBEW lights and to continue his setup and to continue making pictures, or to continue to make pictures with the cameras. Mr. Bell refused again by not doing anything. He just shrugged his shoulders.

Q. Did Mr. Pantell say anything about that time?

A. Again, Mr. Pantell interjected and said, "It is either 1212 or there will be no show."

Hearing Officer: All these conversations with Bell—were they in the presence of Mr. Pantell?

The Witness: Yes, sir, they were.

[fol. 72] Hearing Officer: Within his hearing?

The Witness: Yes, sir; they were.

Q. By Mr. Dannett: Did the crew go out to dinner that evening?

A. Around 6 o'clock, I noticed that there were very few technicians around the control area and I approached Mr. Bell and asked him where they were. Mr. Bell informed me that he had sent them out to dinner shortly after six. I asked him why he sent them out. He said, "Well, perhaps something will turn up by the time they come back from dinner."

Q. When did the men return from dinner?

A. They started to come back around 6:25 or 6:30.

Q. When they did return, did you give any further instructions to Mr. Bell?

A. Well, I kept asking Mr. Bell every so often to continue making—to continue the setup, but to remove the IBEW lights. It was always refused.

Q. Was there any request to make pictures?

A. There was always a request to make pictures to Mr. Bell.

Q. Did they make pictures?

A. No, they did not.

Q. And were instructions given, after the men returned from dinner, to tear down the equipment?

A. Yes. At approximately 7:30, when I reported to Mr. Bates, who arrived at the Waldorf-Astoria approximately 7 p.m.—I reported to Mr. Bates that the men were not obeying my instructions; that they refused to continue with the setup, that they were not tearing down the IBEW lights.

It was finally decided that since they were refusing these orders—Mr. Bates said, "Well, there is no other alternative but to tell the men to pack up their equipment and go home," which information I relayed to Mr. Bell.

Mr. Bell started to—gave instructions to the men, approximately 7:40 or thereabouts, 7:30 or 7:40, to tear down [fol. 73] the equipment. Mr. Bell said, "Well, that's it," and he gave these instructions to tear down the equipment.

It was about this time that I asked Mr. Bates if we could not possibly leave the equipment up on the basis that perhaps by 11 o'clock or 11:15 someone would change their mind and a compromise or something would be arrived at and we could put the show on eventually.

Mr. Bates agreed with me and I gave instructions by hand signal first to stop tearing down the equipment.

Q. Did you give instructions that they reset the equipment?

A. After I explained to Mr. Bates why I thought it would be a good idea to leave the equipment remain standing, Mr. Digges and Mr. Gallagher came by and also made the same request.

We informed him that the request was being followed out, Mr. Digges being the manager of WCBS-TV.

I immediately went to Mr. Bell and told him to reset all the equipment that he had torn down, if he had torn down any. Mr. Pantell, who was standing there, said, "Nothing doing."

I told Mr. Bell to take down the IBEW lights but to continue setting up the equipment that he had torn down. At this time, Mr. Pantell interjected again and said, "No, it's either 1212 lighting or nothing at all." I repeated my instructions to Mr. Bell to continue setting up any equipment he had torn down and remove the IBEW lights.

At this time Mr. Pantell interjected and said, "No, we are only kidding ourselves."

Q. Did there come a time during the course of that evening in which you suggested to Mr. Pantell or Mr. Bell [fol. 74] that you go on with the existing lights only?

A. Yes, sir, that is correct.

Q. What was your conversation with respect to that?

A. About 10:40, I approached Mr. Pantell and asked him if he would be willing to put the show on without any IBEW lights, without any IA lights, using only the existing house lights.

Mr. Pantell said he would agree to that. He said he is willing to put the show on.

I said, "I first have to check with the IA, to see if they would be willing to agree to it."

I contacted Mr. Raymond, who was backstage, and told Mr. Raymond what I had suggested to Mr. Pantell, to question the IA if they would go along with putting a show on without any lights, either IA or IBEW lights. Mr. Raymond said he would contact the IA officials at the Waldorf and question them about this.

Mr. Raymond did this, and Mr. Raymond explained to the IA officials--

Mr. Spivak: I will object to what he explained. He wasn't present.

Q. Did you have a further conversation then with Mr. Pantell or with Mr. Bell?

A. Yes.

Q. Tell us about that.

A. After I heard from Mr. Raymond again as to what the outcome of my suggestion was, I walked back to the control area, since there wasn't anything further I could do. When I made this suggestion, incidentally, Mr. Raymond and I discussed the conversation about no lights at all, and Mr. Raymond went out to make a phone call. He told me he was going to call Mr. Bates and explain the suggestion to Mr. Bates.

[fol 75] I returned to the control room area, where Mr. Pantell saw me and Mr. Bell saw me. Mr. Pantell said to me, "What was the outcome? What did the IA say?"

I said, "The IA said no."

Again at this time I asked Mr. Bell if he would continue making pictures, put the show on without any IBEW lights. Mr. Bell shrugged his shoulders and that was the end of the conversation.

Mr. Silagi: I am prepared to stipulate that the certifications that exist covering these employees--and by "these employees," I refer now to both the stagehands and to the technicians--that the certifications do not, in and of themselves, specifically cover or mention the particular issue at hand, namely, remote lighting.

Hearing Officer: You are referring now to the certification that is in evidence and that I ruled out?

Mr. Silagi: That's right.

Hearing Officer: Now you have that.

Mr. Dannett: I will accept that.

[fol. 76] BEFORE NATIONAL LABOR RELATIONS BOARD

BOARD'S EXHIBIT 2.

AGREEMENT

COLUMBIA BROADCASTING SYSTEM, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

May 1, 1956-January 31, 1958

2

Article I

SECTION 1.04. JURISDICTION. The work covered by this Agreement shall include all of the following work:

(a) In connection with the installation (except such new construction work as is within the jurisdiction of the IBEW and as may be determined by mutual agreements with other local unions or, failing such agreement, by the International Office of the IBEW to be under the jurisdiction of some other of its local unions), operation, maintenance and repair of radio broadcast, television, sound effects, facsimile and audio equipment and apparatus by means of which electricity is applied in the transmission, transference, production or reproduction of voice, sound and/or vision with and/or without ethereal aid, including all operation and maintenance connected with flying spot scanners, motion picture projectors (subject to the exceptions hereinafter stated) and all types of recording on disc, wire, video tape, audio tape, kinescope or television recording and/or any other means of recording which may supplant, substitute for or augment the foregoing.

(b) Recording operations shall include recording, re-recording, duplicating and playback by means of the following: disc, wire, tape, audio tape recorders, video tape recorders, wire recorders, disc recorders and all types of

playback mechanisms, including turntables, wire and video and/or audio tape playback equipment, kinescope recorders and any combination of electronic cameras and motion picture cameras, such as "slave cameras" (including the loading of film for such). Motion picture projection machines and slide projectors and any other apparatus which is used to transmit, transfer or record light or sound for immediate or eventual conversion into electric energy, and/or all recording operations, including the editing of video and audio tape performed by the Employer, shall be deemed to come within the scope of this Agreement and such work shall be performed by Technicians. In Chicago and St. Louis the operation of turntables for playback purposes shall be excluded from the foregoing and, in Chicago, all sound effects operations shall also be excluded.

Nothing contained in this paragraph shall be deemed to apply to the playback of recordings for audition purposes only or to the viewing of film for sales, promotion and similar purposes where not in connection with rehearsal or broadcast.

[fol. 78] Similarly, nothing herein shall apply to the work of operating motion picture projectors and/or slide projectors in the operation known in the industry as "front and rear screen projection."

(c) The work covered by this Agreement does not include the operation of effect projectors used to supplant, substitute for or augment scenery only, on live sets.

(d) Any electronic or electrical device or devices mounted on or attached to equipment operated by Technicians and/or operated from the control room shall be set up and/or operated by Technicians, with the exception of the device known as "Teleprompter" which Technicians shall attach and remove from camera dollies and/or tripods but (when operated from the "floor") may be operated by persons other than Technicians.

(e) With respect to the work of editing, cutting and/or splicing motion picture film, where such work is performed by Technicians on the New York staff, said work is included in the jurisdiction covered by this Agreement.

At Chicago, the work of editing, cutting and/or splicing motion picture film, including magnetic tape used as a substitute for the sound track of motion picture film and the

operation of motion picture projectors for the purpose of screening film for the editing and cutting of such film, is not included within the jurisdiction covered by this Agreement.

At Los Angeles, the work of editing, cutting and/or splicing motion picture film, including cutting and editing [fol. 79] magnetic tape used in conjunction with or as a substitute for motion picture film (in accord with the National Labor Relations Board certification in Case No. 21-RC-1983 and in conformance with any clarification which may hereafter be issued by the Board in said case) and the operation of motion picture projectors for the purposes of screening film for the editing and cutting of such film is not included within the jurisdiction covered by this Agreement.

(f)^o The jurisdiction covered herein includes, where the following work is performed by Technicians employed on the New York staff: the shooting of motion picture film inserts, openings and similar incidental and supplementary short film sequences produced for integration in live programs, rear screen projection process plates, film shots for on-the-air promotion (except where film commercials are used for such purpose), maps and animations produced for use in live programs other than News and Public Affairs programs; including the recording of the sound track for such film and the lighting for such shooting. The foregoing, however, does not include feature productions, shorts, commercials, newfilm and/or documentaries or any other type of filming not specifically included.

CBS agrees that it will not shoot motion picture film (including the recording of sound track in connection therewith) or contract out such work to be performed in any properties in which Technicians are regularly or occasionally employed under the terms of this Agreement unless such work is performed by Technicians. It is understood between the parties that the above reference to [fol. 80] "properties" in which Technicians are "regularly or occasionally employed" shall not be construed as applying to any motion picture film studios which are physically separated from any building in which Technicians are employed.

(g) Where power generating equipment for electric

power purposes is operated by CBS employees in connection with remote broadcast, field operations or transmitter operations, such operation shall be performed by Technicians covered by this Agreement.

(h) All machine shop work performed in the Engineering Research and Development Department of CBS in connection with the manufacture, production, assembly and repair of any machinery, apparatus or equipment used for radio and/or television broadcasting, and/or recording, and/or experimental, and/or development work, shall be performed exclusively by those Technicians who have been heretofore known as "Machinist-Technicians."

(i) All working drawings, technical drawings and/or mechanical design drawings made in the Engineering Research and Development Department at New York shall be made by Technicians regularly assigned as Draftsmen. Such Technicians shall perform no other duties during any workweek when assigned as Draftsmen.

At all cities except New York, such drawings shall be made by Technicians whose assignments to the work are made on a daily basis and who may be assigned to other duties during the same day, but such drafting assignments and other duties will not be simultaneously performed.

[fol. 81] The provisions of this sub-Section shall not apply to sketches, rough preliminary drawings or architectural drawings; such work may be performed by other persons.

(j) The following definitions shall be applied with respect to the work jurisdiction of Technicians employed in the Laboratory Division:

- (1) Breadboards. Any group of components assembled in temporary form, for the sole purpose of determining circuit characteristics.
- (2) Experimental Unit. The unit from which a prototype may be evolved. It may consist of one or more "breadboards".
- (3) Prototype. The first model, from which it is hoped other units will be built as copies.
- (4) Production Unit. All those units built as copies of a prototype.

- (5) **Commercial Unit.** Any unit offered for sale or purchaseable in the open market.
- (6) **Construction.** The layout, assembly and wiring of components resulting in 1, 2, 3, 4 or 5 above.
- (7) **Modification.** Changes of components, circuitry or wiring in units (4) or (5) above.
- (8) **Testing.** Comparing the performance or construction of units (4) or (5) above with a standard or standards.
- (9) **Debugging.** Determination of the characteristics of a unit and adjustment or change of such unit to bring about a desired performance.

In accordance with the above definitions, only Technicians shall perform the following work:

- [fol. 82] (1) All construction as defined above.
- (2) All testing as defined above.
 - (3) All modification, as defined above, following debugging of the first of such units. It is understood that "Debugging" may be participated in by non-IBEW Engineers where CBS considers it to be essential to the particular project.
 - (4) All repairs to any above unit.
 - (5) Operation of any above unit as provided in the contract.
 - (6) All installation of any above unit built in CBS Laboratories or at CBS' order, whether developed in whole or in part by CBS, when such equipment is used by CBS.
 - (7) All maintenance of any of the above units.

(k) It is understood that the listing of specific items of Trade Jurisdiction in the preceding subsections of this Section is not intended to limit the scope of coverage of the general provisions in this Section establishing the Trade Jurisdiction of the work covered by this Agreement.

(l) Technicians shall not be required to perform any work which is inconsistent with the provisions of this Section and only Technicians shall perform any of the work specified herein including the handling and distribution of technical equipment.

(m) Equipment built in CBS laboratories or at CBS' order, whether developed in whole or in part by CBS, when used by CBS will be installed by Technicians.

[fol. 83]

Article IV

SECTION 4.01. Assistant Technicians. (a) In New York and Los Angeles, Assistant Technicians employed prior to the date of this Agreement may perform any one or more of the following duties: Operating dollies, moving, transporting, storing and/or removing camera dollies, microphone booms, lamps cables, and parallel, transporting, placing, and, under the supervision of a Technician, Assistant Supervisor, Technical Director or Supervisor, setting up and dismantling field equipment; assisting in receiving set installation and service and acting as driver or mechanic for Engineering Department vehicles.

(b) CBS agrees that any Assistant Technicians hired on or after the date of this Agreement shall be limited to the following duties:

Acting as driver or mechanic for Engineering Department vehicles, and/or loading and/or unloading technical equipment.

It is further agreed that by or before January 31, 1958; Assistant Technicians on staff as of May 1, 1956, shall be limited to the duties as set forth in this paragraph (b) or shall have become Technicians.

(c) No Assistant Technician shall be required to perform any duties of Technicians except as set forth in Sub-Section (a) above.

(d) Those Assistant Technicians who are qualified to do Technicians work shall be given preferred consideration [fol. 84] for any vacancies which may exist on the staff of Technicians.

BEFORE NATIONAL LABOR RELATIONS BOARD

Employer's Exhibit 1**PROPOSED AMENDMENTS—1955**

Preamble. Line 5: Delete all references to Columbia Broadcasting System, Inc. of California.

Line 17: Add Local Union 715 of Milwaukee, Wisconsin.

Line 23: Change to read:

"* * * assigns at all radio, television, relay, short-wave and FM broadcasting stations owned and/or operated by CBS."

Line 34: Change to read:

"This Agreement is limited to Technicians employed at stations owned and/or operated by CBS and Technicians employed by CBS in the Laboratory Division and the General Engineering Department in New York City."

Section 1.04. (a) Add: "set up and operation of field lighting equipment used on field pickups and the operation of film projectors, wherever used, for rehearsal purposes."

(e) Change sub-paragraph (i) to read:

"Where such work is performed by Technicians employed by the Company at New York and Milwaukee, said work is included * * *"

(h) Delete this sub-section in its entirety and re-letter subsequent sub-sections accordingly.

[fol. 85] BEFORE THE NATIONAL LABOR RELATIONS BOARD,
SECOND REGION

[Title Omitted]

**Stenographic Transcript of Testimony at Hearing of
February 10, 1958**

2 Park Avenue
New York, N. Y.,
Monday, February 10, 1958.

Met, pursuant to notice, at 1:30 p.m.

Before: Alba B. Martin, Trial Examiner.

Appearances:

Samuel M. Kaynard, Esq., Counsel for General Counsel,
2 Park Avenue, New York, N. Y.

Messrs. McGoldrick, Dannett, Horowitz & Golub, By:
Emanuel Dannett, Esq. and Herbert Schwartzman, Esq.,
3 East 54th Street, New York, N. Y., appearing on behalf
of the Employer and E. Thayer Drake, Esq., 485 Madison
Avenue, New York 22, N. Y.

[fol. 86] Robert Silagi, Esq., 745 Fifth Ave., New York,
N. Y., appearing for Local 1212.

Messrs. Spivak & Kantor, By: Harold B. Spivak, Esq.,
of Counsel, 225 Broadway, New York, N. Y., appearing
for Intervenor, Local 1, IATSE AFL-CIO.

PROCEEDINGS

COLLOQUY BETWEEN TRIAL EXAMINER AND COUNSEL

Mr. Kaynard: * * *

Would the reporter please mark as General Counsel's
Exhibit No. 2 the following document, which is a letter
dated November 27, 1957, from Morris S. Miller, Enforce-
ment-Examiner of the National Labor Relations Board,
Second Region, to Local 1212, the respondent, in connection

with an inquiry by Mr. Miller of the respondent as to its intention to comply with the Board's determination of dispute.

In connection with this document, it is further stipulated that the respondent Local 1212 received such document and that counsel for respondent, Mr. Robert Silagi, likewise received such document.

Moreover, it is stipulated that the original of this document was on a letterhead of the National Labor Relations Board, Second Region. The letterhead does not appear on this document because it is a copy, which is in the possession of the respondent.

Trial Examiner: You mean the original is in the possession of the respondent?

Mr. Kaynard: Yes.

[fol. 87] Mr. Silagi: No objection.

I want to point out merely that the General Counsel's Exhibit No. 2 was incorrectly addressed, but ultimately we did get a copy, but at a date much later than November 27, 1957.

Trial examiner: Do you stipulate with Mr. Kaynard the things that he has offered to stipulate?

Mr. Silagi: Yes.

Trial Examiner: Do counsel deem that date significant?

Mr. Kaynard: No. Not by virtue of the next exhibit, Mr. Examiner.

Mr. Silagi: It might be relevant if we had let the ten days go by without replying. However, that isn't the case here.

Mr. Kaynard: Since compliance did not turn upon the ten-day period, but upon continued refusal or failure to comply, the ten-day period is not important, for purposes of this proceeding. The date of receipt is not important, except in so far as it was received prior to the response made by the respondent, which would be the next exhibit.

[fol. 88] BEFORE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 2

Radio & Television Broadcast Engineers
Union, Local 1212, IBEW-AFL-CIO
1270 Sixth Avenue 11 W 4284
New York, N. Y.

November 27, 1957.

Re: Radio & Television Broadcast Engineers Union Local
1212, IBEW-AFL-CIO (Columbia Broadcasting System,
Inc.) Case No. 2-CD-146

Gentlemen:

You have recently received a copy of the Decision and Determination of Dispute by the National Labor Relations Board in this case. The Board has determined that: Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, and its agents are not and have not been entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force or require Columbia Broadcasting System, Inc., to assign the work of setting up and operating lighting equipment on remote telecasts to its members rather than to other CBS employees, who are members of Theatrical Protective Union No. One, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

In accordance with the Board's Determination you are directed to notify the Regional Director for the Second Region, in writing, on or before December 5, 1957, of the [fol. 89] steps you have taken to comply with the terms of the Board's Decision and Determination of Dispute.

Very truly yours, Morris S. Miller, Enforcement
Examiner.

cc: Robert Silagi, Esq. 217 Broadway New York, N. Y.

BEFORE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 3

Schoenwald, Silagi & Seiser

COUNSELLORS AT LAW

745 Fifth Avenue . New York 22, N. Y.

MAURICE L. SCHOENWALD,
ROBERT SILAGI,
LEONARD SEISER,

TELEPHONE

MURRAY HILL 8-2660
December 11, 1957.

National Labor Relations Board,
Second Region,
2 Park Avenue,
New York 16, New York.

Att: Morris S. Miller, Enforcement Examiner

Re: Radio & Television Broadcast Engineers
Union Local 1212, IBEW-AFL-CIO
(Columbia Broadcasting System, Inc.)

Case No. 2-CD-146

Gentlemen:

With respect to your letter dated November 27, 1957, please be advised as follows:

[fol. 90] My client, Radio & Television Broadcast Engineers Union, Local 1212, IBEW, AFL-CIO, will not comply with the decision and determination of the National Labor Relations Board in this case, dated November 25, 1957. The Board's decision is erroneous, both as to law and fact. It is my client's intention to press this matter to an ultimate review by an appropriate court of law.

Very truly yours, Robert Silagi, Robert Silagi for,
Schoenwald, Silagi & Seiser.

RS:rmp

cc: Mr. Charles A. Calame, Bus. Mgr., Local 1212 Executive Board, Local 1212, IBEW

[fol. 91] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL
1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD—March 19, 1959

To the Honorable, the Judges of the United States Court of
Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*, as amended by 72 Stat. 945), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, its officers, representatives, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as Case No. 2-CD-146.

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interest of its members in the State of New York, within this judicial circuit where the [fol. 92] unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 9, 1958, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, representatives, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 13 (g) of this Court, the Board is certifying and filing with this

Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole the Board's said Order and re-[fol. 93] quiring Respondent, its officers, representatives, agents, successors and assigns to comply therewith.

Dated at Washington, D. C. this 19th day of March 1959.

National Labor Relations Board, /s/ Thomas J.
McDermott, Associate General Counsel.

[fol. 1] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Appendix to Respondent's Brief

BEFORE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM TESTIMONY

WILLIAM C. FITTS, JR., called as a witness on behalf of the Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

• • • • •
Direct examination.

By Mr. Dannett:

• • • • •
By Mr. Dannett:

Q. In order to properly telecast a program, is it necessary to do any lighting, that any lighting work be done in connection with that program?

A. On many programs it is necessary, yes; on some, it is not.

Q. Will you please tell us what the lighting work in general consists of?

A. Well, you know I am not an expert on operations of this work, but I can tell you in general that it consists of placing or hanging whatever lights are required and of operating those lights. It also involves bringing them and taking them away, but the primary job is the placement or hanging and the operation after they are placed.

Q. Although you are not an expert, Mr. Fitts, can you tell us something about the types of lights that have to be used where lights are necessary?

A. Well, I can't tell you very much, but I can tell you very broadly, I think. You have in some instances lights or lamps on the camera, the so-called clip-on on the camera itself. You have the regular stage lights in the studios operated through the switchboard or the dimmer board.

You have in some instances footlights. You have spot lights. You have some remotes, you have scoops, stands, things of that kind.

Q. Who does the lighting work if the program originates from one of the CBS stages or studios?

[fol. 2] A. Local No. 1, the Stagehand's Union, Local No. 1, IATSE, Stage Electricians.

Q. If the program is a remote program, who does the work?

A. This is a matter which has been in dispute, Mr. Dannett, ever since I have been connected with CBS. We have had continuously, throughout the period I have been here, a running dispute between Local No. 1, IATSE, and Local 1212, IBEW, as to the handling of lights on remote originations. We have never had an agreement on that. It has operated on a case-by-case assignment basis.

Q. And if assigned, will it be assigned, within the City of New York, either to Local 1212 or to Local of IATSE?

A. That is correct, it will be assigned to one or the other and the company has to make the assignment in each case.

Q. If the assignment is to Local 1212, who assigns the technical crew to do that work?

A. What we call the Technical Operations Department.

Q. And if assigned to Local 1 of IATSE, who will make the actual assignment?

A. The Staging and Studio Department.

Q. If stagehands—

A. I think I ought to add one thing, though: This is the regular operation of the company in these departments, but in all disputed cases, in every case where a claim is made that the work should be assigned one way or another, by one or another of the unions, or in every case where one or the other of our operating departments feels that a question is or may be involved, it comes to my office and the final decision on assignment is made by me.

Q. Could you tell us the procedure that is followed in a case where there is a dispute and the matter is referred to you?

A. It can come up in one of two ways generally, Mr. Dannett. One of the ways it comes up is that one or the

other of the unions calls me or Mr. Bates, my assistant, and says in substance, "We hear there is going to be such [fol. 3] and such a remote origination. We think the lighting belongs to us. We think it should be assigned to us."

When it comes this way, it then comes immediately to me. I then talk with the operating departments, try to determine which way we think the work should be assigned. That is one way it comes.

The other way it comes is when one of our own operating men, either someone in the stage and studio operation, or someone in technical operations on the management side, knows one of these originations is coming up, has heard from one source or another that there is trouble. They call me. Then I have to get the facts and again I have to make the decision on the assignment.

Q. If such a decision is reached by you, do you then give instructions to the department which has asked for the ruling, or the departments?

A. I give instructions to both departments when the decision is made. If a decision is made that the assignment should be made by Local No. 1, I give instructions to the management people who are operating in that area to assign the work and to obtain the necessary help, if they need to employ extra men. I also then inform technical operations that the assignment has been made to Local No. 1 so that they may inform their people, and it is vice versa. If the assignment is made to 1212, it operates in the opposite way.

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By Mr. Dannett:

Q. Mr. Fitts, in your telephone conversation on April 9th with Mr. Calame, you stated that you described the program to him.

Would you please tell us what you did say in that connection?

A. I told him that it was my understanding that this program was being put on by the American Theatre Wing [fol. 4] in the Grand Ballroom of the Waldorf; that they were using the stage there; that on the stage they were going to have some singing acts interspersed in the award cere-

monies as the ceremonies went on; that they were going to have a master of ceremonies on the stage conducting the entire proceedings; that they were calling up to the stage the recipients of the various awards; that it was going to be necessary to light the stage itself and, in addition, it would be necessary to have side lights. Also, there would have to be follow spots, both to follow the acts and to follow the recipients of the awards on my understanding of the facts.

I also told him that it was my understanding that the American Theatre Wing had some preliminary conversations with representatives of Local No. 1 about the work in and around the stage and had already made some commitments to the effect that they would have to have some stagehands there, in any event.

That was the substance. And I told him that on those facts, trying to follow the general criteria that we had used in the past, we felt this assignment should be made to Local No. 1.

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Hearing Officer: Mark that for identification as Employer's Exhibit No. 4.

(Thereupon, the document above referred to was marked Employer's Exhibit No. 4 for identification.)

Hearing Officer: That is a true copy of the telegram you sent on that day?

The Witness: That is correct.

Hearing Officer: That day being what?

The Witness: April 19th, sir.

Hearing Officer: Is there any objection to its being received in evidence, Mr. Silagi?

[fol. 5] Mr. Silagi: No objection.

Hearing Officer: It will be received.

(Thereupon, the document previously marked Employer's Exhibit No. 4 was received in evidence).

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Q. What took place on the 25th?

A. Mr. Lighty, Mr. Calame, Mr. Pantell and Mr. Harold

Katan—I believe that's correct—met with Mr. Charley Gariat, who is one of the engineers in charge in technical operations, Mr. Raymond and myself in my office. And the entire discussion was taken up with, first, another rehashing of what the past had been, and, second, the effort by the representatives of Local 1212 to have me put down in writing some agreement as to how these assignments would be made.

Q. Who is Mr. Katan?

A. He is a business representative, I believe, of Local 1212.

Q. What did you state with respect to Mr. Katan's request that you place in writing the past practice?

A. I stated two things: One, that it was impossible to do this and get any protection for the company because there was another union involved and we would have to have agreement by both unions on any such definition before the company would have any protection whatsoever; that this is the same thing that had been going on since 1950. Every effort had been made over and over to get these two unions to agree on this matter, and every effort had failed.

I also said that I didn't see how we could get it into an agreement because we disagreed so to the actual situations in the past.

Q. Is that in substance the position of both parties at that meeting?

A. That's right.

[fol. 6]

Cross-examination.

By Mr. Spivak:

Q. Has the company evolved any pattern under which it determines who is to be assigned on remote originations?

A. We have attempted to do so, yes, within our own operations.

Q. And you have attempted in the past to adhere to this pattern as closely as you can?

A. That is correct. I might add that it is not always easy

and I suspect that anybody trying to operate under this kind of day-by-day operation is going to make some mistakes on it.

Q. Can you tell us what this pattern is?

Mr. Dannett: I would like at this time to object to evidence as to this pattern. I would like to go into that at some length, if you don't mind, sir.

As I understand Section 8(b)(4)(D), if a union, in order to compel an assignment of particular work, refuses to perform other work, that is an unfair labor practice unless there is a certification which the employer has refused to follow.

Hearing Officer: Or under the Board's rulings, a contract.

Mr. Dannett: Which we don't agree with but which exists, if there is a contract which the employer has refused to comply with. The Board has also clearly stated that custom and practice in this area is immaterial; that what the prior assignments may have been is of no consequence if there is neither a certification nor a contract, a clear and unambiguous contract.

Therefore, I think at this time I would like to object to any evidence as to what has been the past practice on the part of this employer, or what the employer's sought to [fol. 7] do in making these assignments, as being immaterial to the issues before the Board.

Hearing Officer: Read the question, Mr. Reporter.

(Question read.)

Hearing Officer: How can you possibly be hurt by an answer to that question? Mr. Fitts testified very clearly that he is between the devil and the deep blue in trying to satisfy both of them. He doesn't admit any legal obligation to either of them.

Mr. Dannett: I don't think we will be hurt.

Hearing Officer: All he is doing is telling how he tries to keep his employer out of trouble, and he tells you that he gives certain types of work which he thinks he would like to give to one. He gives other types of lighting work to the other. He doesn't say that he is bound to do it in that fashion, but that is the fashion he evolved and he tries to

keep up with it in order to avoid troubles and interruptions, in the work that his company is performing.

Mr. Dannett: Mr. Hearing Officer, however, if Mr. Fitts is permitted to answer that question, you will find that you are opening up an area of testimony which may prolong this hearing by several days because Local 1212 and CBS have not been in agreement with respect to this question of practice. Local 1212 will proceed, I am sure, as they have done on other occasions, to show that the practice is different than that stated by Mr. Fitts and therefore you are going to have a question of conflicting evidence on the practice of practice.

If the question of practice is immaterial to the case, then it would seem to me that the simplest thing to do is to exclude all of it.

[fol. 8] Mr. Silagi: May I be heard on this question?

Hearing Officer: Yes.

Mr. Silagi: I think this question really goes to the heart of the entire problem. If we were to follow Mr. Dannett's advice to exclude it, merely on the basis of the fact that by admitting this kind of testimony we would be prolonging this hearing by several days, I think this is just about the best thing that could happen. I think this is incumbent upon the Board to hear this kind of testimony, to consider it and to judge upon the basis of this very kind of testimony.

Now, Mr. Dannett has adverted to the fact that the Board has previously stated that custom and practice is immaterial. This may be true. However, there is a decision very recently by the Court of Appeals in the Third Circuit, the National Labor Relations Board against the Plumbers and Pipe Fitters Union, which specifically takes the Board to task for refusing to consider the matter of custom and practice. It says it is mandatory that they do this. Otherwise a Section 10(K) proceeding has no meaning whatever. I should be happy to supply you with the citation in that particular case.

I think that decision is binding upon the Board and must be followed here. Apart from that, we get into the question of why is this important in this particular case. You heard Mr. Fitts tell you that his method of assignment apparently operates on a case-by-case basis. If there is no certification, if there is no contract, what is the Board going to

decide? It has to decide solely on the basis of what has happened in the past. If it doesn't decide on the basis of what has happened in the past and attempt to draw some pattern of conduct from the party's own actions in this [fol. 9] case, then we fall into a mechanistic sort of thing, where the boss comes up and says, "I assign this work to Union A, and absent a certification and absent a Board ruling to the contract, that's the way it's got to be and nothing else."

I respectfully submit that American labor has progressed a great deal farther than that in the last 50 years; that we don't take rulings merely by boss's fiat.

I submit that Mr. Dannett is completely erroneous in his desire to exclude this testimony. This is the very heart and guts of the case. This is what we have to hear.

Hearing Officer: In the absence of a certification or a contract, CBS is at liberty to go on making its decisions on a day-to-day basis. They are absolutely within their rights. I will rule that in the absence of proof of a contract which controls their assignments, or a certification which controls their assignments, that tradition, and area practice are irrelevant and I will sustain the objection.

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Mr. Silagi: Mr. Broadwin, I am now in a position where I will make an offer of proof.

Hearing Officer: That is a sensible thing.

Mr. Silagi: If you will permit me, I will elicit from this witness and from company witnesses the following facts:

1. That since 1946, when CBS went into commercial television, there have been a certain number of remote telecasts; that on these remote telecasts the assignment of lighting has been to technicians of the IBEW.

2. Over a period of years, this has been taken away from the IBEW to a very limited extent.

[fol. 10] 3. That as of the current year, the past 12 months, ending today, contrary to what Mr. Fitts has said, there have been four—

Mr. Spivak: I am going to object to this. He is making an offer of proof and says he will elicit from this witness so and so. Now he says that he will elicit things that Mr. Fitts

will dispute. I don't see how he can offer proof on this when the witness will dispute it.

Mr. Silgai: I have evidence which will show—

Mr. Spivak: That doesn't constitute a valid offer of proof, then.

Hearing Officer: Wait, just a second, please.

Mr. Silgai: I will show that in the past 12—

Hearing Officer: You now offer to prove by witnesses?

Mr. Silgai: By witnesses and documentary evidence that during the past 12 months there have been an average of four remote telecasts per week.

I will also prove that with respect to those remote telecasts there has been a clear assignment of all lighting work in 95 per cent of the cases to the IBEW.

Mr. Dannett: By CBS?

Mr. Silgai: By CBS, yes, without any dispute by anybody, either Local 1212 or the IA; that in the balance of the 5 per cent, there has been a clear assignment of all lighting work to the IA, by reason of various criteria established by Mr. Fitts or people under him. It is only with respect to a fraction of 1 per cent on remote telecasts that there is any dispute at all as the lighting assignment.

I will prove that in the past 12-month period, in fact, there has been only one dispute out of more than 200 such remote telecasts.

[fol. 11] I will further prove, if permitted, that the assignment of the lighting work at the Waldorf-Astoria for the "Tony" Awards is in essence the same kind of assignment as had been made in the Waldorf-Astoria previously and is in essence the same kind of lighting and assignment as had been made at other hotels.

I am further prepared to prove that there is an inconsistency in these assignments, whereas previously the assignment of lighting on remote telecasts, both on the Waldorf-Astoria, under the identical circumstances as in the "Tony" Award, was made to the IBEW. For reasons which we cannot understand, the assignment in the particular situation, in the "Tony" Award, was made to the IA.

I think for all these reasons which I have just cited to you in my offer of proof, I should be permitted to elicit these facts:

Hearing Officer: Well, my reaction to that is this: that

absent an agreement definitely and clearly entitling you to that work, or a certification, they can be as inconsistent as they please. They can assign the work to you or to anyone else. They can disregard both of you, Local No. 1 and Local No. 1212.

Mr. Silagi: Perhaps they can, but they have not.

Hearing Officer: Just a moment, please. Again, absent that agreement, I will reject your offer of proof and adhere to my ruling.

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Q. Mr. Flits, at the time you called Mr. Sather, on April 9, 1957, and told him of the arrangement, were you aware of the fact that the American Theatre Wing con-[fol. 12] tained an officer who is also an officer official of Local No. 1 of the Stagehands?

A. No, I had no such knowledge.

Q. You were aware of the fact, however, that the American Theatre Wing had preliminary conversations with Local 1 and had made some kind of commitment with the stagehands to employee members of the Stagehands?

A. That's correct.

.

By Mr. Silagi:

Q. Did you also tell Mr. Sather at the time that you were following the general criteria of previous assignments?

A. I did.

Q. And did you tell him what those previous criteria were?

A. I have been over that with him many times. I think I went over it again in general, yes.

Q. What did you tell him at that time?

Mr. Spivak: I object to this.

Hearing Officer: Let him tell it again.

The Witness: Just a minute. I have to understand this question.

Hearing Officer: Read the question.

(Question read.)

Hearing Officer: Did you tell him how you went about deciding as to which one to assign this lighting work to, whether it was Local 1 or Local 1212?

The Witness: I told him in general, yes.

Hearing Officer: Well, you tell us, as nearly as you can presently recall, what you told him in that connection.

The Witness: I told him that I thought this assignment should be made to Local No. 1 because it involved the staging of these acts on the stage in the same way that we had [fol. 13] with other originations from this same room involving such shows as the Auto-Lite show for several years, the Pillsbury Bake Off show for several years and the General Motors show for several years. Each of these were on the stage with singing acts, masters of ceremonies and were quite similar in their setup to this show. These were the things I went over with him.

By Mr. Silagi:

Q. Did you also discuss with him the question of the assignment of lighting in the ballroom of the Waldorf-Astoria involving the dinner at which Secretary Humphreys spoke to the Investment Banking Association?

A. I did not, because the show had never been called to my attention. There had never been a question on the show.

Q. Did you also discuss with Mr. Sather the assignment of the lighting at the dinner at the Waldorf-Astoria where lighting was assigned to the IBEW, at which time the Queen of England was honored?

Mr. Dannett: May I at this time interpose an objection?

Hearing Officer: This brings us right back to what I ruled. He doesn't have to explain or discuss.

.

Q. An April 5th you met with Messrs. Lighty, Calame, Pantell and Katan, Giriat and Raymond; is that correct?

A. Yes.

Q. And you were asked at that time to specify in writing the manner in which assignments were to be made in the future?

A. That's right.

Q. And you refused to do that?

A. I said I couldn't.

Q. You were unable to?

A. That's right. I said it was impossible, to protect the company.

[fol. 14] Q. Protect the company against what?

A. Against conflicting claims. It was just as impossible to make such an agreement in April 1957 as it was in April 1956, when your representatives asked for such an agreement in the negotiation of the contract, and it was just as impossible as it was in 1955, when Local No. 1 asked for such an agreement. In each case it was impossible because we cannot agree on this subject until we get an agreement from both of the unions.

ALBERT J. RAYMOND, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Cross-examination.

By Mr. Dannett:

Q. At any time while you were present, was there an offer made by Mr. Levin, the engineer in charge, to do this TV show using existing house lights only?

A. Yes.

Q. About what time was this offer made?

A. Shortly before 10 o'clock, maybe 9:40 or 9:50, something like that.

Q. Did he ask you for any comments about this?

A. Yes.

Q. Or was it just a matter of information that he was passing on to you?

A. No, he asked me to comment on it and get the reaction of Local 1.

Q. He asked you to get the reaction of Local 1 of the Stagehands?

A. Yes, sir.

Q. Did you?

A. I did. By coincidence they happened to have a table at this dinner and most of the officials were there. I discussed it with them.

[fol. 15] Q. Which officials did you discuss it with?

A. Mr. Jacobi, the president.

Q. That is Vincent Jacobi?

A. Yes, Mr. Horohan, who is business agent, and Mr. Pernick. They said they were there from 9 o'clock in the morning. They were ready, willing and able to go. There was no reason why we should not use their lights. They would not go on under those conditions because they had already set up and spent the day setting up.

ROBERT PANTELL, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Cross-examination.

By Mr. Silagi:

Q. Was there ever any time on the date in question, April 21, 1957, when Local 1212 receded from the position which had originally been taken, namely, that unless it could do the lighting work it would do no work?

A. Yes, there was.

Q. When did that come about, approximately what time?

A. Approximately ten minutes after ten.

Q. In the evening?

A. Of the evening of April 21st.

Q. Will you tell us, please, how it came about?

A. Mr. Sam Levin—

Q. Who is he?

A. The engineer in charge of field operations for CBS and the highest CBS technical authority executive on the scene approached me.

Q. Was anybody else present at the time he approached you?

A. Yes; Mr. Bell was with him.

Q. Where did this conversation take place?

A. On the second balcony of the Waldorf, in the immediate vicinity of the location where the technicians had set up the control room.

Q. What did Mr. Levin say to you and what did you say to him?

A. Mr. Levin said, "We can do the show with existing lights," to the best of my recollection. He then said, "Neither you"—meaning the technicians—"nor the the IA stagehands will operate any supplemental lights. We can do it this way. Will you go along with an arrangement of this sort?"

Q. What was your reply?

A. I said, "Yes, we will."

Q. What did he say?

A. He said, "Fine, I will have to check it with the IA," and he left.

Q. After that, what happened?

A. He returned.

Q. About what time?

A. I would say from five to ten minutes after he had left, and he said, "The stagehands won't go along with it."

Q. By the way, did this offer originate with you?

A. No, sir, it did not.

Q. Did it originate with Mr. Levin?

A. I got it from Mr. Levin, yes.

Q. Did Mr. Levin indicate to you in any way that the show with existing house lights could produce a satisfactory picture?

A. The fact that he put the proposition to me—

Mr. Dannett: That is objected to.

Hearing Officer: Answer the question.

A. The fact that he put the question to me—

Hearing Officer: Read the question again, Mr. Reporter, please.

(Question read.)

Hearing Officer: Did he indicate to you in any way that the show with the house lights alone would result in an adequate picture?

[fol. 17] The Witness: Yes, he did.

Hearing Officer: What did he say?

The Witness: By asking me whether I would go along with arrangements of that nature.

Hearing Officer: He said nothing, though, to that effect.

The Witness: He said, "We can do the show with existing lights." This to me indicated that in his technical competence, they could produce the show with the existing house lights.

Recross-examination.

By Mr. Silagi:

Q. I show you a document entitled "CBS Remote Lighting."

Do you recognize that?

A. Yes.

Q. Please tell us what it is?

A. This is a history of remote lighting on CBS telecasts from the year 1946 to the present.

Q. What does it purport to show?

A. It purports to show the actual work done regarding the lighting of remote telecasts from the year 1946 to the present.

Q. Does it have any—this is only with respect to remote lighting; is that right?

A. That's correct.

Q. A subject which is under discussion right now?

A. That is correct.

Q. It does not purport to show all lighting done by CBS?

A. No, it does not, only remote lighting.

Q. And does it also indicate by whom the lighting was done?

A. That is correct, it does.

Q. Does this document also show that the lighting was done by assignment by CBS?

A. Yes.

Hearing Officer: Why not mark this for identification and then the record will reflect what it is you are talking about? [fol. 18] Mr. Silagi: I ask that this document be marked as Local 1212 Exhibit No. 1 for identification.

Hearing Officer: It will be so marked for identification.

(Thereupon, the document above referred to was marked Local 1212 Exhibit No. 1 for identification.)

By Mr. Silagi:

Q. Was Local 1212 Exhibit No. 1 for identification prepared by Local 1212?

A. It was.

Q. Based upon what materials was it so prepared?

A. Based on material obtained from CBS.

Q. I direct your attention to pages 15 through 19 of this exhibit. In the right-hand column the title is "Done By" and then there are various notations, "IA." Please tell us what that means.

Mr. Dannett: Mr. Hearing Officer, I think enough questions have been asked to indicate that this is another effort on the part of Local 1212 to go into the question of past practice. Since you have already ruled that past practice is immaterial, I object to the question and all other questions relating to this schedule.

Mr. Silagi: Mr. Broadwin, in view of your previous ruling, I have no doubt that you are going to reject this as a document in evidence. However, it will go before the Board as a rejected exhibit.

Hearing Officer: Yes.

Mr. Silagi: I think, in view of that fact, I can have this witness explain the code, the symbols, so that if you are overruled at least the Board will be in a position to interpret the document correctly.

Hearing Officer: I will let you do that.

[fol. 19] Mr. Silagi: That is all I am interested in at this point.

By Mr. Silagi:

Q. Again directing your attention to pages 15 through 19 of this exhibit, there are many blank spaces in that right-hand column.

Will you indicate what is the meaning of the exhibit where there is no notation, where it is blank on the right-hand side?

A. The meaning of the absence of any other notation was that the lighting was done by the IBEW technicians.

Q. Members of Local 1212; is that right?

A. Yes.

Q. And on pages 1 through 14 there are notations on the right-hand column "Done by IBEW" or "IA," as the case may be.

A. That is correct.

Mr. Dannett: I would like to ask one question as to the qualification of Mr. Pantell with respect to this schedule. You were not personally involved in any of these telecasts, were you?

The Witness: Which ones?

Mr. Dannett: The telecasts set forth in the schedule.

The Witness: Yes, I have personal knowledge of several of them.

Mr. Dannett: You don't have personal knowledge of all?

The Witness: Yes; as a matter of fact, I do. If you will take any of those programs starting at page 15, each and every one of them, the Godfrey program, "Let's Take a Trip," "Camera 3," "Good Morning Show," and down the list, each one of those programs in turn would have been [fol. 20] brought specifically to our attention, meaning the union officers' attention, if the lighting work had been any other—had been planned to be done by any other group than indicated on this. In other words, on the "Let's Take a Trip," on 7-1-56, if CBS had assigned the work to the stagehands rather than to the IBEW, this specifically would have been brought to our attention.

Mr. Dannett: Of this schedule here, which probably has perhaps a hundred telecasts, there are are only about a dozen—

Mr. Silagi: There are 180 telecasts.

Mr. Dannett: Of the 180 or only a dozen or a dozen and

a half which have the letters "IA" alongside of them, so that you would have only knowledge of roughly a dozen or a dozen and a half of the 180 telecasts; is that right?

Mr. Silagi: To be specific, there are 180 remote telecasts contained between pages 15 and 19, of which only 10 were done by the IA.

Mr. Dannett: So he would have knowledge as to 10 out of 180; is that right?

The Witness: I believe, Mr. Dannett, that in the last pages we are talking about, I have had specific knowledge of others that were done by IBEW.

Mr. Dannett: Mr. Hearing Officer, I think this witness has demonstrated, from his own words, that he hasn't the technical competence to give information regarding this schedule. He has testified now that he knows of a dozen and maybe a few others of 180 telecasts. He is now testifying as to what took place in those telecasts. I don't think that he can properly testify concerning them.

Mr. Silagi: The witness has already testified that this is a compilation based upon material and information which [fol. 21] CBS itself supplied. We are offering it for that particular purpose.

As I said before, in view of your past rulings on excluding the question relating to history, practice, custom and usage, I have no doubt that you are going to be consistent and you will exclude this. It is my purpose to introduce this into evidence; and if the Board thinks that custom and practice is a necessary element in this case, then it has the evidence before it. That is the purpose of this exhibit.

Mr. Dannett: Wholly apart from the question of materiality with respect to past practice, I am saying that there is no proper foundation that has been laid for the introduction of this document. Mr. Silagi has repeatedly stated that this information has been furnished by CBS. If it has been so furnished by CBS, certainly, someone would have to testify and bring the original documents which support this document.

Mr. Pantell himself, as I say, has demonstrated that he only knows the facts concerning a few of the 180 telecasts. I say that this document, wholly apart from the original question of materiality, is not admissible in evidence.

Mr. Spivak: I point out to you that on the April 21st show, the "Tony" Awards show, it doesn't have the IA as having been assigned to this work. It is blank in this very document. That is a symbol of the accuracy of this document.

Hearing Officer: He has admitted long ago—I mean at the outset of this hearing—that the IBEW handled almost 95 per cent of the lighting.

Mr. Spivak: We have to maintain the record very clear with respect to that, because 95 per cent of the overall lighting is done by the IA, I maintain.

[fol. 22] Mr. Dannett: That is studio lighting.

Mr. Silagi: We are talking about remote lighting.

Mr. Spivak: This is important, if it is going into the record in any form. It has been very convenient for the IBEW to attempt to separate the lighting function between that which is in studios, which we have by acknowledgment and by confession, as against that which is done by remotes, in which area we have a dispute. But if a document of this type is in evidence for any purpose, I think we should be entitled then to show that 95 per cent of lighting work, a function, is in the jurisdiction of the IATSE admittedly, and there is an area of dispute with respect to certain remote kinds of lighting.

In that area of remote, we have a further subdivision as to the type of remotes, and our quantity is not significant. I think that the proof would show that 95 per cent or more of the stage productions on remotes are done by IATSE. Now, we make no claim to do lighting, if there is any at a baseball game. It is not significant that the IBEW may have had a thousand cases of baseball games. That is not lighting functions. We are talking about stage productions, and this is the type of thing that we say is within our jurisdiction.

I object to the document because I think it is a very misleading document. If it has any value at all, it can only have value if you break it down as to the types of remotes in each case and to show that on the type of remote that we are discussing in this proceeding, a stage performance at the Waldorf, that we have the predominance of the work.

Mr. Silagi: I am prepared to dispute that with Mr. Spivak.

I am prepared to go into that testimony, but you have already excluded it.

[fol. 23] Hearing Officer: I am not prepared to have either of you go into that.

Mr. Silagi: I am also prepared to stipulate that there is no dispute with respect to remote lighting at places such as IA houses, at places where there is a complete show which leaves a studio and goes to a remote point of origination, things of that kind. There isn't any dispute. I fail to see what the quarrel is. We are talking about remotes of the kind of the "Tony" Awards. If you want to receive evidence about lighting at remotes of the kind of the "Tony" Award, I am here, ready and able to do it.

Hearing Officer: I will sustain the objection to this document going into evidence.

Mr. Silagi: I assume, then, it will go in as a rejected exhibit; is that correct?

Hearing Officer: It is going in as a rejected exhibit, yes.

(Thereupon, the document previously marked Local 1212 Exhibit No. 1 for identification was rejected.)

By Mr. Silagi:

Q. I show you a letter dated January 14, 1955, signed by L. D. Bates, addressed to Charles Calame.

Have you seen that before?

A. Yes, I have.

Mr. Silagi: I ask that this letter be marked for identification as Local 1212 Exhibit No. 2.

(Thereupon, the document above referred to was marked Local 1212 Exhibit No. 2 for identification.)

Hearing Officer: I will state on the record that I sustain the objection to the introduction of that document in [fol. 24] evidence. I rejected it because it simply goes to the question of the extent of practice and tradition, and that is not relevant in the absence of a contract or certification.

Mr. Silagi: Is there any question with respect to the accuracy of Local 1212 Exhibit No. 2?

Mr. Dannett: We will object to the document, but we will not question that it is accurate.

Mr. Spivak: I object, Mr. Broadwin, also on the grounds that it is inaccurate, in that it does not actually portray a full picture of relevant facts, if practice and tradition are relevant at all.

Mr. Silagi: I ask that Local 1212 Exhibit No. 2 be received in evidence.

Mr. Dannett: I would like also, in adding to my objection as to materiality, to point out that this letter was written prior to the making of the agreement of May 1, 1956. It will be recalled that that agreement was made without changing the jurisdictional provision despite the demand for such change which, if granted, would have given this union jurisdiction over remote lighting work.

Mr. Silagi: May we have a ruling?

Hearing Officer: You have offered this letter together with the paper attached?

Mr. Silagi: Yes, which is part of the same exhibit.

Hearing Officer. And you are objecting to it on what ground?

Mr. Dannett: I object to it on two grounds: first, materiality, since the letter bears on past practice, and past practice is irrelevant in this case; secondly, that this letter predates the making of the agreement, which agreement, as I have pointed out, was made without changing the jurisdictional provision that the union had demanded that [fol. 25] it get remote lighting work and that demand had not been acquiesced in and was not agreed to in the agreement of May 1, 1956.

Hearing Officer: I will sustain the objection.

Mr. Silagi: I assume that Local 1212 Exhibit No. 2 will be a rejected exhibit.

Hearing Officer: Yes.

(Thereupon, the document previously marked Local 1212 Exhibit No. 2 for identification was rejected.)

Mr. Silagi: At this point, I want to advert to my previous offer of proof and inform you that, if permitted, I would use Local 1212 Exhibits 1 and 2 to show the accuracy of the statements which I made earlier today.

Hearing Officer: I will reject the offer of proof and adhere to my ruling.

.

SAMUEL LEVIN, called as a witness on behalf of Columbia Broadcasting System, Inc., being first duly sworn, took the stand and testified as follows:

Cross-examination.

By Mr. Silagi:

Mr. Silagi: I am now attempting to demonstrate that Mr. Levin made a proposal to produce the TV show with existing house lights.

Q. Is that correct, Mr. Levin?

A. It wasn't a proposal. It was a suggestion.

Q. You made such a suggestion?

A. Yes.

[fol. 26] By Mr. Silagi:

Q. Mr. Levin, did you testify in the U. S. Court for the Southern District of New York, in the matter of Charles T. Donds against Radio and Television Broadcasting Engineers Union, on June 21, 1957?

A. Was that on a Friday?

Q. Yes.

A. I did.

Q. Did you testify at that hearing?

A. I did.

Q. I now read from the record, page 116, the middle of the page. This question is put by me to you; as follows:

"Q. At the time you made the proposal to put the show on with the existing house lights, was there adequate time to get everything ready and in operation to do the show as you thought it could be done?"

Mr. Spivak: I object to the question.

Hearing Officer: I will let it go in. Then you can make your motion to strike it out.

By Mr. Silagi:

Q. Mr. Levin, in the proceedings before the U. S. District Court, was this question asked of you and did you give this reply?

Hearing Officer: Just read the answer.

Q. The answer was, "Yes, sir." Did you make such a reply to my question before the U. S. District Court?

Mr. Spivak: I now object to the question and answer as immaterial and ask that it be stricken from the record.

Hearing Officer: Sustained. Strike it out.

.

[fol. 27] Q. Again going back to the testimony before the District Court, I will read to you a question and answer appearing on page 113. I am asking the questions. I will start at the bottom of 112.

"Q. Did you ever make a proposition to Mr. Pantell or to Mr. Bell, or to both of them, that you thought this show could go on with existing house lights?

A. Yes, sir.

"Q. What did that mean?

A. It means that if there were no lights except the house lights, that an acceptable picture, but a little noisy, would be produced."

.

Mr. Silagi: Mr. Broadwin, at this point I again renew my application to you to permit me to introduce evidence bearing on custom, usage and practice, for all the reasons which I have given before. I am prepared at this time, if you will permit it, to go extensively into the problem to show what has happened over the past 11 years, to show, as a matter of fact, that what was called a staged show for the "Tony" Awards was in effect no different from many, many other shows produced both at the Waldorf and various other hotels around town, and various other locations.

If you will reverse your ruling and permit me to do that, I think we will have a full and complete record.

Hearing Officer: I can't go along with you, Mr. Silagi. I shall adhere to my ruling.

[fol. 28] BEFORE NATIONAL LABOR RELATIONS BOARD

COLLOQUY BETWEEN TRIAL EXAMINER AND COUNSEL

2 Park Avenue,
New York, N. Y.,
Monday, February 10, 1958.

Met, pursuant to notice, at 1:30 p.m.

Before: ALBA B. MARTIN, Trial Examiner.

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Trial Examiner: Do you have anything to say, Mr. Silagi?

Mr. Silagi: Yes. I had prepared to move to dismiss the complaint, and I think this may be just as good an opportunity as any other. I will treat it in relation to Mr. Kaynard's request.

My separate defense here is based both on the merits of the case and also procedurally. With respect to the procedure, which I shall treat first, I refer you to the Board's Rules and Regulations, Subpart E, entitled "Procedure to Hear and Determine Disputes Under Section 10(k) of the Act," which appears on page 29 of the pamphlet printed by the National Labor Relations Board, "Rules and Regulations, Series 6; as Amended."

I refer you to that entire subpart E, and particularly to Section—

Trial Examiner: Excuse me, but I have a blue-covered one.

Mr. Kaynard: Page 32.

Trial Examiner: All right.

Mr. Kaynard: Subpart E.

Trial Examiner: "The Procedure to Hear and Determine Disputes under Section 10(k) of the Act."

Mr. Silagi: That is correct.

In particular, I refer you to Section 102.73, entitled "Proceedings Before The Board, Further Hearings, Briefs,

Certification," and also to Section 102.74, "Compliance [fol. 29] With Certification, Further Proceedings," and Section 102.75, "Review of Certification."

The National Labor Relations Board has seen fit to promulgate these rules and regulations, and in three separate clauses here, the Board refers to a certification which shall result from a Section 10(k) proceeding. This, I think, is in compliance with the law and certainly in compliance with the legislative history and intent and purposes of the Act.

If you will examine the document entitled "Decision and Determination of Dispute," which is reported at 119 NLRB 71; and referred to in my correspondence and in the correspondence of Mr. Miller, the Enforcement Examiner of the Board, you will find that nowhere in this document—which is the basis for the complaint and notice of hearing in this proceeding—is there any reference to a certification.

This, I think, procedurally makes the instant proceeding defective, and it must be dismissed on that ground alone.

Apart from that, I urge a dismissal of the complaint on other grounds, which I would like to go into at this moment.

I urge my motion to dismiss on the following grounds:

1. That the Board has failed and refused to admit relevant and material evidence relating to the issues of custom and practice in this particular case, and by failing to receive such evidence, it has arbitrarily curtailed the rights of the respondent and has denied the respondent due process of law, to which it is entitled.

As a second ground for my motion to dismiss, I urge the fact that the Board's decision and determination of dispute is unlawful and improper, and that it failed and refused to make an affirmative award of jurisdiction, namely, the certification which I referred to before; that by failing to make an award, the Board has not acted in accordance with the law, or in accordance with its own rules and regulations, and that its action clearly violates the intent and [fol. 30] purpose of the Act as expressly stated in the legislative history of the Act. In this connection, I refer you to the discussion contained in Judge Hastie's decision, NLRB

against Plumbers and Pipefitters, which is reported at 242 Fed. 2d 722, decided on March 27, 1957.

Third, that the Board should remand this case for a further hearing under Section 10(k), and that such a hearing be a full and complete hearing, namely, an arbitration type of hearing, such as is contemplated by the law.

I have one further argument.

Trial Examiner: Is that a separate motion, that motion to remand?

Mr. Silagi: This is a separate motion to remand.

I have one further argument to present to you, and I think perhaps it might be made right now. I think depending upon how you rule, we will either have a very short or a very protracted hearing here, protracted at least for a couple of days.

I urge upon you the fact that the Board's decision and determination of dispute is a futile document. This past Thursday, on February 6, 1958, Columbia Broadcasting System, Inc., the employer involved here, filed two charges, one under Section 8(b)(4)(A), which has the No. 2-CC-452, and the other, a charge under Section 8(b)(4)(D), which has the number of 2-CD-161. I am informed that these two charges are based upon a similar situation as we have here today, namely, a refusal by a union, or an inducement by a union, to strike and to refuse to perform services arising out of an assignment of lighting at a remote telecast, which is substantially the basis for the charge and the complaint in this particular case.

I urge upon you the fact that, had the Board done its duty in making an affirmative award of jurisdiction, or in granting a certification, as is contemplated by the Board's own rules and regulations, this matter, the instant matter, [fol. 31] and certainly the proceedings which were initiated last week, most likely would never have come to pass.

The Board, as I see it, has an obligation to determine, according to the law, exactly which union is entitled to certain work jurisdiction. This it has failed to do. The proof of the pudding is in the eating, namely, in refusing to do what it is required to do, it merely stirred up additional litigation, which certainly is not the function for any administrative agency.

I state to you it is time that the illustrious members of

the Labor Board came down from Cloud No. 7 down to terra firma and really grappled with the issues as they are presented to them by the various employees and their collective bargaining representatives. This is what is needed to determine the dispute, not the kind of wishy-washy determination of dispute as is contained in the Board's decision and determination of dispute dated November 25, 1957.

For the foregoing reasons, Mr. Trial Examiner, I urge that the complaint therein be dismissed.

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Trial Examiner: The way the Board has passed upon specific evidence in a specific matter, I don't really consider it within my authority to overrule the Board on that specific evidence in that specific matter, which it seems to me is what you are asking me to do in this particular situation.

So with reference to Mr. Silagi's motion to dismiss the complaint, because he was denied full opportunity to develop its case and present its evidence, which, as he has stated, relates to the rejection of the custom and practice with reference to what group of men should do the particular work in dispute, with reference to that, I consider myself bound by the Board decision and determination of dispute in this particular case, particularly in footnote 2 of 119 NLRB 71.

[fol. 32] Those remarks of mine would go also to the motion to remand, which, as I understand Mr. Silagi, would be for the purpose of taking that evidence, which the Board has already held was properly rejected.

As for Mr. Silagi's point about the legal necessity under the Act of the Board's making a certification, in this very case, 119 NLRB 71, the Board has held that Local 1212 is not entitled to that work, and that the Board is not called upon to pass on the question as to whether Local 1 of IATSE is entitled to the work. It seems to me that there again you are asking me to pass upon a specific matter that the Board has already made a determination on in the earlier portion of this proceeding.

In view of that, and in view of my previous remarks, I

will deny the motion to remand and I will deny the motion to dismiss the complaint.

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Trial Examiner: Does the respondent Local 1212 have any defense to offer?

Mr. Silagi: Yes, sir. Mr. Trial Examiner, at this point I should like to refer you back to the record which was made in the Section 10(k) proceeding part of this record, which appears starting at page 66 and going through page 68. In those pages, I made certain offers of evidence—excuse me, certain offers of proof, to the effect that if permitted, I would prove through the witness who was then on the stand, Mr. William C. Fitts, Jr., Vice President in Charge of Labor Relations for Columbia Broadcasting System, that certain things were facts, all having to do with custom and practice.

I renew that offer of proof today.

I also refer you to pages 336 and 337, wherein again there is reference to an offer of proof.

I further offer to prove, if permitted, that the parties themselves, to wit: Columbia Broadcasting System and [fol. 33] Local 1212, in their discussions immediately prior to April 21, 1957, the date of the Tony Awards Program, had many and complete discussions on this matter, and these discussions revolved about the very same problem, namely, custom and usage at CBS with respect to Local 1212, in general encompassing the entire problem of the assignment of lighting on remote telecasts.

I offer to prove, if permitted, through Mr. Fitts and through other witnesses whom I have present and available here today, these things, and I also refer you back to the documentary evidence in this case, which again shows that the parties themselves spoke about the custom and usage, that it was upon the basis of custom, usage and practice that the assignment was made in the manner in which it was made.

For all of these reasons, I respectfully urge you to permit me to go into these matters carefully and thoroughly.

.

Mr. Silagi: I refer you in particular to Local 1212's Exhibit Nos. 1 and 2, which were rejected, all bearing upon the question of custom and usage. I also refer you to Employer's Exhibit No. 4, which is a telegram sent by William C. Fitts, Jr., Vice President of CBS in Charge of Labor Relations, to Mr. Albert O. Hardy, who is the Director of Radio and TV for the International Brotherhood of Electrical Workers Union, dated April 19, 1957, and in said exhibit, Mr. Fitts specifically adverts to the fact of past practice, and he bases his decision to award the assignment upon past practice, and I read to you the pertinent sentence. He says: "Such assignment"—referring to the assignment of IATSE members to lighting at remote telecasts—"is contrary to our past practice with respect to the pickup of presentations of this character from the Grand Ballroom of the Waldorf."

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[fol. 34] Trial Examiner: Did you say that was rejected?

Mr. Silagi: Not this one. This is in. This was admitted. This telegram appears on the stationery of Columbia Broadcasting System, Inc., apparently a private wire, dated April 19, 1957, and it is addressed to Mr. Albert O. Hardy, whom I have previously identified, and it is signed by William C. Fitts, Jr., who has also been identified.

The telegram reads as follows:

"Re: Waldorf Remote. Lighty and Pantell"—parenthetically, these gentlemen are representatives of the IBEW—"Insist all lighting must be assigned to 1212. This creates an impossible situation for two reasons. First: Such assignment is contrary to our past practice with respect to the pick-up of presentations of this character from the Grand Ballroom of the Waldorf. Second: Despite the fact that I notified 1212 of this situation on April 9, it was not until yesterday, after all commitments and assignments had been made, that I had any word of trouble. Under these circumstances we must proceed as we had planned. If there is a stoppage we will have no choice but to proceed with our legal remedies.

"I tried to reach you on the telephone in order to explain the gravity of this situation. I was unable to do so.

but do feel that you should have this statement of our position."

I call your attention to the fact that in this telegram, which is two days prior to the show in question, Mr. Fitts, Director of Labor Relations, based his decision solely and exclusively upon two reasons: one, upon past practice, and two, upon a claim that the notice to him that we wanted, or that Local 1212 wanted, the assignment too late, and there was nothing else that was discussed by the parties, and there was no other reason ever given for the assignment as it has been made.

[fol. 35] I therefore urge upon you that all this evidence, all this material, which I am prepared to adduce right now, and have always been prepared to adduce, is relevant and material to a determination of the issues. I therefore urge that you admit it.

Trial Examiner: Are you through, Mr. Silagi?

Mr. Silagi: Yes. I believe I have referred to the fact that there were prior meetings between Mr. Fitts and representatives of the International Brotherhood of Electrical Workers and Local 1212, and if permitted, I am prepared to show that the subject matter discussed at these meetings revolved almost exclusively about the matter of past practice and custom. I think this is an additional reason why the matter should be explored now and the matter should be before the Board.

Trial Examiner: As Mr. Silagi said earlier, his offer of proof relates to testimony that was proffered at the 10(k) proceeding, plus more of the same.

Under all the circumstances, I feel that issue has been passed upon in the Board's decision and determination of dispute in Footnote 2, and therefore will reject the offer of proof.

[fol. 36] BEFORE NATIONAL LABOR RELATIONS BOARD

LOCAL 1212 EXHIBIT 2 FOR IDENTIFICATION

(Letterhead)

Columbia Broadcasting System, Inc.
485 Madison Avenue
New York 22, N. Y.

LOUNSBURY D. BATES, Asst. Director of Labor Relations

January 14, 1955.

Mr. Charles Calame,
IBEW (Local 1212)
11 West 42 Street,
New York, N. Y.

Dear Charlie: *

Herewith four copies of a summary of our actual practice with respect to the Lighting on Remotes for the years 1952, 1953, and 1954.

The information for the prior years had to be constructed from our records of the scheduling of assignments and the time permitted for preparation was inadequate to have the entire job tabulated and typed. However, a portion of it has been put into understandable form and the balance will have to be lifted from the scheduling sheets which are submitted herewith in rough form.

I believe that the over-all picture is clear and significant. If you have any further questions please do not hesitate to call upon us.

Best regards.

Sincerely yours, /s/ Biff Bates, L. D. Bates.

LDB:jf

[fol. 37] SUMMARY OF ACTUAL PRACTICE WITH RESPECT TO
LIGHTING ON REMOTES—1952, 1953 AND 1954

(1) 1952

There were 54 Remotes upon which the lighting function was performed. Of these IBEW Technicians did the lighting on 38. IA Stagehands did the lighting on the following 16:

All Around the Town—2 shows—stage productions at an armory

The Steve Allen Show at the St. George Hotel

The Faye Emerson Show at St. Albans Hospital

Suspense—2 shows at the Waldorf

Faye Emerson at Loew's State

Celebrity Time—Madison Square Garden

The Easter Show—2 shows—Sherry Netherland

Television Clinic at the Waldorf

All Around the Town at Coney Island

A pickup from the 46th Street Theatre

The Flag Dog School

Pillsbury Baking Contest at the Waldorf

Toast of the Town at the Roxy

(2) 1953

There were a total of 48 remotes upon which the lighting function was performed. Of these IBEW Technicians did the lighting on 38. The following 10 productions were lit by Local No. One Stagehands:

The General Motors Show at the Waldorf

The Easter Show at the Plaza

Suspense at the Waldorf

Adventure at the Museum of Natural History

The Ice Capades at Madison Square Garden

A color Clinic at the Waldorf

A color remote at the Museum of Art

Toast of the Town at Carnegie Hall

Toast of the Town at the Metropolitan Opera House

A Color demonstration at the Waldorf

[fol. 38] (3) 1954

There were 102 remotes upon which the lighting function was performed. Of these IBEW Technicians did the lighting on 94. The following 8 productions were lit by Local No. One Stagehands:

Toast of the Town from Boston
 The General Motors Show from the Waldorf
 Suspense from the Waldorf
 Toast of the Town from a battleship—New York Harbor
 Toast of the Town from a Westchester Country Club
 The Morning Show from Mitchell Field
 Toast of the Town from Mitchell Field
 I've Got a Secret from the Statler

[fol. 39] BEFORE NATIONAL LABOR RELATIONS BOARD

EMPLOYER'S EXHIBIT No. 4

COLUMBIA BROADCASTING SYSTEM, INC.

Private Wire

Date: April 19, 1957
 Charge to Account No.
 (Div.) 414 (Dept.) 71 07

Mr. Albert O. Hardy,
 9230 Kingsbury Drive,
 Silver Springs, Maryland.

Re: Waldorf Remote. Lighty and Pantell insist all lighting must be assigned to 1212. This creates an impossible situation for two reasons. First: such assignment is contrary to our past practice with respect to the pickup of presentations of this character from the Grand Ballroom of the Waldorf. Second: despite the fact that I notified 1212 of this situation on April 9, it was not until yesterday, after all commitments and assignments had been made, that I had any word of trouble. Under these circumstances we must proceed as we had planned. If there is a stoppage we will have no choice but to proceed with our legal remedies.

I tried to reach you on the telephone in order to explain the gravity of this situation. I was unable to do so but do feel that you should have this statement of our position.

William C. Fitts, Jr.

[fol.40] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 24

October Term, 1959

Argued October 16, 1959

Docket No. 25573

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL
1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, Respondent.

Before: CLARK, *Chief Judge*, MOORE, *Circuit Judge*, and
J. JOSEPH SMITH, *District Judge*

OPINION—December 3, 1959

The National Labor Relations Board petitions for enforcement of a cease and desist order it has entered against the respondent union on a finding of unfair labor practices. 121 N. L. R. B. No. 158. An earlier decision concerning this matter is reported at 119 N. L. R. B. 954. Enforcement denied.

[fol. 41] MELVIN J. WELLES, Atty., National Labor Relations Board, Washington, D. C. (Jerome D. Fenton, Gen. Counsel, Thomas J. McDermott, Asso. Gen. Counsel, Marcel Mallet-Prévost, Asst. Gen. Counsel, and Arnold Ordman, Atty., National Labor Relations Board, Washington, D. C.), *for petitioner.*

ROBERT SILAGI, of Schoenwald, Silagi & Seiser, New York City (Arthur L. Galub, New York City, on the brief), *for respondent.*

CLARK, *Chief Judge:*

The National Labor Relations Board petitions for enforcement of its order that the respondent union (IBEW)

cease and desist from conduct found to constitute an unfair labor practice under §8(b)(4)(D), 29 U. S. C. §158(b)(4)(D), the "jurisdictional dispute" provision of the Labor Management Relations Act of 1947. Briefly stated, the underlying dispute is between the respondent union and an IATSE local¹ over assignment by the Columbia Broadcasting System of lighting work in connection with certain "remote" television broadcasts, i.e., those not originating in the company's home studios. This continuing dispute has necessitated the cancellation of several telecasts following work stoppages by one of the unions when lighting work was assigned to the other. The present proceeding arises from such an incident instigated by respondent's refusal to operate the camera equipment unless it also performed the program's lighting tasks.

[fol. 42] For purposes of this enforcement proceeding, respondent concedes its violation of §8(b)(4)(D). But it contends that the Board failed to comply with the special procedure prescribed by §10(k), 29 U. S. C. §160(k).² This section provides that when an unfair labor practice is charged under §8(b)(4)(D), "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen," with an ex-

¹ Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO.

² Sec. 10(k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

ception not here involved encouraging voluntary adjustment of the dispute. The Board concedes that a determination under this section is a prerequisite to the issuance of a cease and desist order, but contends that its hearing and finding fulfilled the requirement.

Thus the only question involves the construction of the statutory direction to "determine the dispute." The Board's position is that its finding that the respondent had no claim by contract, order, or certification to the disputed work suffices, while respondent maintains that the Board is required affirmatively to allocate the work to one of the competing unions. This issue has been resolved against the Board by the Third and Seventh Circuits. See *N. L. R. B. v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of U.S. and Canada Locals 420 and 428, AFL (Hake)*, 3 Cir., 242 F. 2d 722; *N. L. R. B. v. United Brotherhood of Carpenters and Joiners of America*, [fol. 43] *ica, AFL (Wendnagel)*, 7 Cir., 261 F. 2d 166. But the Board has adhered to its position, although it has not sought certiorari to resolve the dispute.

We turn first to an examination of the statutory language. The scheme of §10(k) is to provide an opportunity for the private adjustment of disputes causing jurisdictional strikes; but in the absence of such adjustment, the Board itself is to determine the disputes. It is difficult to attribute any meaning to the word "dispute" unless it refers to the controversy between the unions as to which is entitled to the work. It also seems clear that the Board's function is to impose a settlement in the event that the parties are unable themselves to reach agreement. Since private adjustment can only envision agreement as to which group is entitled to the work, the Board is required to make this determination where private negotiation proves unsuccessful. Further, under the Board's view that Congress has left the determination of disputes involving work assignments to the employer, the §10(k) hearing and determination become superfluous. Private settlement would be equally encouraged by a provision for a 10-day notice in advance of an unfair labor practice proceeding.

Although the language of the enactment is unambiguous, the legislative history is not thereby rendered immaterial. But since Judge Hastie in the *Hake* case, *supra*, 3 Cir.,

242 F. 2d 722, has fully reviewed this history, we shall content ourselves with a brief summarization. The original provision, as adopted by the Senate, would have settled jurisdictional disputes by compulsory arbitration before a Board-appointed arbitrator or in the alternative through adjudication by the Board itself. S. 1126, 80th Cong., 1st Sess. (1947). But the arbitration clause was deleted in conference committee, so that the bill as enacted prescribed Board determination alone. H. R. Conf. Rep. No. 510, 80th [fol. 44] Cong., 1st Sess. 57 (1947). The discussion of these provisions on the floor and in committee reports leaves no doubt that the Congress contemplated affirmative Board adjudication of disputed work allotments. See *Hake, supra*, 3 Cir., 242 F. 2d 722, 725; 71 Harv. L. Rev. 1364, 1366 (1958).

The Board urges that its policy has encouraged the voluntary settlement of jurisdictional disputes and thus has refuted the fears of those who opposed passage of §10(k) on the ground that it would encourage rather than prevent strikes. Such apprehension not only was expressed in the Congress, but also constituted one of the grounds for the Presidential veto. See 93 Cong. Rec. 6452-6453, 6506, 7486. But this line of argument in effect admits that the Board's construction of the Congressional mandate does not conform to the understanding expressed by opponents, as well as proponents, of the section. Since the provision has not been effectuated as enacted, whether or not jurisdictional strikes will be encouraged remains as speculative today as it was in 1947. Since Congress chose to disregard this risk, it is not for the courts or the Board to accord it greater weight. It might also be noted in passing that during the pendency of the present case, another telecast was cancelled because of picketing by the IATSE when the disputed lighting work was assigned to respondent. Thus the prospect of voluntary settlement seems somewhat remote.

The Board also relies on arguments based on the internal consistency of the Act's provisions. Thus it cites §303(a)(4), which contains language substantially identical to that of §8(b)(4)(D), but which by virtue of §303(b) grants an independent action for damages to those injured by jurisdictional disputes. The Board asserts that an incongruous result is reached if damages may be assessed

under §303(a)(4), although the union may be found entitled to the work by virtue of an affirmative allocation [fol. 45] under §10(k). In this respect reliance is placed on *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 9 Cir., 189 F. 2d 177, affirmed 342 U. S. 237. While there is language in the opinion of the Ninth Circuit which supports the Board's position,³ the Supreme Court's decision rests on the premise that the two sections are not to be construed *in pari materia*. It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process.

A conflict is also alleged to exist between an affirmative award of work jurisdiction and the provisions of §§8(a)(3) and 8(b)(2) which protect employees from discrimination because of their union membership or lack thereof. The Board notes its agreement with the suggestion by Judge Hastie in the *Hake* case, *supra*, 3 Cir., 242 F. 2d 722, that a §10(k) determination would not be binding on the employer; but it asserts that the determination "would presumptively authorize that union 'to cause or attempt to cause' the employer to discriminate against the incumbent employees to whom he has assigned the work." But in view of the nature of the disputed tasks here involved it is improbable that any employees will be displaced. Even assuming such displacement, Congress has apparently adjudged that this interest is outweighed by the policy of settling jurisdictional disputes. Further, the same result would seem to be effected by the Board's determination of disputes involving the scope of bargaining units. See *Local 26 (Winslow Bros. & Smith Co.)*, 90 N. L. R. B. 1379; *Amalgamated Meat Cutters & Butcher Workmen (Safeway Stores, Inc.)*, 101 N. L. R. B. 181; *National Association of Broadcast Engineers & Technicians (American Broadcasting-Paramount Pictures)*, 110 N. L. R. B. 1233.

The Board's suggestion that the result here reached

³ "[U]nder the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of the work by [the employer]." 9 Cir., 189 F. 2d 177, 188.

would "erect an almost insuperable obstacle" to the issuance of injunctive relief under § 10(1). *Is* adequately answered by *Alpert v. International Brotherhood of Electrical Workers, Local No. 90, AFL-CIO*, D. C. Conn., 163 F. Supp. 774. Reliance is also placed on the lack of statutory standards on which to base an affirmative determination. But the relevant criteria have been suggested by Board Member Murdock, dissenting in *Local 562 (Northwest Heating Company)*, 107 N. L. R. B. 542, 554.

It may be that the Board's assertions would be more persuasive if the intent of Congress were unclear. Note, however, Professor Cox's testimony that the Board's practice "is unsound whether it is required by the statute or results from misapplication." Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947, Senate Committee on Labor & Public Welfare, 83d Cong., 1st Sess., pt. 4, pages 2428-2431 (1953). It is also instructive that there seems to have been no compliance with the Board's own rules, which recognize its power to allocate disputed tasks. This was the ground on which enforcement was refused by the Seventh Circuit in the *Wendnagel* case, *supra*, 7 Cir., 261 F. 2d 166. Our attention has been directed to the fact that these rules have been "rephrased" subsequent to the hearing herein; but, as the Board itself notes, its rules are immaterial unless they comply with the statutory scheme.

In view of the unambiguous language of § 10(k), and supported as it is by the legislative history and the precedents, we are convinced that the Board's present position contravenes the statutory direction.

Accordingly, the petition for enforcement is denied.

[fols. 47-48] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 25573

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL
1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORK-
ERS, AFL-CIO, Respondent.

DECREE—December 28, 1959

Before: CLARK, *Chief Judge*, and J. JOSEPH SMITH, *District
Judge*.

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on October 9, 1958. The Court heard argument of respective counsel on October 16, 1959, and has considered the briefs and transcript record filed in this cause. On December 3, 1959, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

On consideration whereof; it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board directed against Radio & Television Broadcast Engineers Union Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, its officers, representatives, agents, successors and assigns, be and it hereby is denied.

/S/ Charles E. Clark, Judge, United States Court
of Appeals for the Second Circuit. /S/
Leonard P. Moore, Judge, United States Court
of Appeals for the Second Circuit.

Filed: December 28, 1959.

[fol. 49] Clerk's Certificate to Foregoing Transcript
(Omitted on Printing).

[fol. 50] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—FEBRUARY 18, 1960

Upon Consideration of the application of counsel for petitioner(x),

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 30th, 1960.

John Marshall Harlan, Associate Justice of the
Supreme Court of the United States.

Dated this 18th day of February, 1960.

[fol. 51] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—May 31, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. **69**
860

U.S. Supreme Court
FILED

APR 15 1960

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

J. LEE RANKIN,
*Solicitor General,
Department of Justice,
Washington 25, D. C.*

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

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*Attorney,
National Labor Relations Board,
Washington 25, D. C.*

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 28, 1959, denying enforcement of an order issued against respondent Union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 11-17) is reported at 272 F.2d 713. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 15-17)¹ in the unfair labor

¹ "R." designates the portion of the record printed as an appendix to the Board's brief in the court below.

practice proceeding are reported at 121 NLRB 1207. The Board's earlier Decision and Determination of Dispute (R. 19-26) is reported at 119 NLRB 594.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1959. (Appendix B, *infra*, pp. 18-19). On February 18, 1960, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including April 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Section 8(b)(4)(D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to strike for the purpose of requiring an employer to assign particular work to employees in a particular union or trade rather than to those in another union or trade, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Section 10(k) of the Act provides that, whenever charges are made of violation of Section 8(b)(4)(D), the Board must first "hear and determine the dispute out of which such [alleged] unfair labor practice [arose]."

The question presented is whether, when a charge is made that a strike to require an employer to make

a particular work assignment violates Section 8(b) (4) (D), Section 10(k) requires the Board to determine affirmatively which of the competing employees is entitled to the work or whether the Board satisfies its statutory duty to "determine the dispute" by deciding that the striking union is not entitled to the work.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:

Sec. 8.(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) * * * to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal * * * to perform any service, where an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

Sec. 10. (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have

arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT

A. The Board's findings of fact

In 1952, the Board certified respondent as the bargaining representative of all technicians in certain departments of Columbia Broadcasting System ("CBS") (R. 20; 75). The certification, while enumerating several categories of work, made no mention of the remote lighting work here in dispute (*ibid.*). On May 1, 1956, respondent and CBS executed a collective bargaining agreement which likewise did not cover the work tasks here in dispute (R. 21; 71-84). Indeed, CBS, in the pre-contract negotiations rejected a demand by respondent for inclusion of that work, just as it rejected a similar demand by IATSE² (R. 21; 35-40, 84). Accordingly, the question of remote lighting assignments remained unresolved (R. 21).

The immediate dispute herein centered upon a telecast by CBS of the Antoinette Perry Awards, scheduled for April 21, 1957, from the Waldorf Astoria.

² Local 1 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

Hotel (R. 5; 29-31). On or about April 9, 1957, CBS notified respondent that it would assign the remote lighting work for this telecast to its stagehands, who were members of IATSE (R. 5; 29).

On April 18, respondent's business manager Calame threatened Fitts, vice-president of CBS in charge of labor relations, with "trouble" if CBS insisted on assigning the work to IATSE. IBEW International Representative Lighty and respondent's Business Representative Pantell also insisted to Fitts that respondent was entitled to the work and threatened that there would be "trouble" if respondent did not get it (R. 5; 31, 32, 33, 34, 52-55).

On the afternoon of April 21, after stagehands installed all necessary lights for that evening's program, the technicians represented by respondent installed duplicate lights (R. 5-6; 43-44, 68-69). Pantell explained that it was "an IBEW job. If we don't use our lights we are not doing the show" (R. 6; 44-45, 69). CBS Representative Levin advised Pantell that IATSE would operate the lights, and ordered that the duplicate lights be removed, but Bell, as spokesman for the technicians, refused to remove them (R. 6; 45-46, 56-57, 66, 70). Pantell, following a meeting of the technicians, called by him, advised CBS once more that respondent's members would not operate the cameras and necessary incidental equipment if IATSE's lights were used (R. 6; 46, 71). The technicians refused to finish installing the necessary equipment, and did not report for the rehearsal scheduled between 6 and 7 p.m. (R. 6; 48, 71). Finally, at about 10:30 p.m., Levin once more

asked the technicians to make pictures, and they again refused (R. 6; 74-75). As a result the scheduled program was cancelled (R. 6; 50).

B. Proceedings before the Board

1. The Section 10(k) proceeding

The unfair labor practice charges filed in April, 1957, alleged that respondent had violated Section 8(b)(4)(D), the "jurisdictional disputes" section of the statute (R. 19). Pursuant to the statutory scheme for the handling of jurisdictional disputes, the Board in June 1957 held the hearing prescribed by Section 10(k) to "hear and determine the dispute" out of which the charge of a Section 8(b)(4)(D) violation arose (*ibid.*).

The Board found, on the basis of the facts set forth above, that CBS's assignment of the remote lighting work to its stagehands, who were members of IATSE, was not in contravention of an order or certification of the Board, and that respondent had no contract with CBS that bound CBS to assign the disputed work to its members (R. 24-25). Under these circumstances, the Board found that respondent was not lawfully entitled to force or require CBS to assign remote lighting work to its members rather than to other CBS employees (R. 25).

Accordingly, the Board directed respondent to notify the Regional Director within ten days whether it would comply with the Board's determination (R. 26).

2. The unfair labor practice proceeding

Respondent having refused to comply with the Board's direction (R. 7, 11; 86-87, 88-90), the Gen-

eral Counsel of the Board, on December 27, 1957, issued a complaint alleging a violation of Section 8(b)(4)(D) of the Act. Included in the evidence adduced at the ensuing unfair labor practice hearing were the official records of the prior Section 10(k) proceeding.

Upon the evidence thus adduced, the Board concluded that respondent violated Section 8(b)(4)(D) by "inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in a strike or a concerted refusal * * * to perform service with an object of forcing or requiring CBS to assign the work of setting up and operating lighting equipment on remote telecasts to its members rather than to other CBS employees, members of Local 1 [IATSE]" (R. 11-12).

C. The Board's order

The Board's order requires respondent to cease and desist from engaging in, or inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in, a strike, or other proscribed conduct, where an object thereof is to force or require Columbia Broadcasting System to assign particular work to members of the respondent union rather than to other employees, except insofar as such action is permitted under Section 8(b)(4)(D). Affirmatively, the order directs respondent to post appropriate notices of compliance with the order (R. 16-19).

D. The decision of the Court of Appeals

The court below denied enforcement of the Board's order on the ground that Section 10(k) requires the

Board affirmatively to allocate the work to one of the competing unions or groups as a prerequisite to the issuance of a cease-and-desist order under Section 8(b)(4)(D), and that it is not enough for the Board merely to determine that the striking union is not entitled to the work by virtue of a contract or Board order or certification. Section 10(k), the court held, contemplates "affirmative Board adjudication of disputed work allotments" and the Board's "function is to impose a settlement in the event that the parties are unable themselves to reach agreement" (*infra*, pp. 13-14).

REASONS FOR GRANTING THE WRIT

The ruling below that the Board is required by Section 10(k) of the Act affirmatively to allocate the disputed work between the competing employees as a prerequisite to the issuance of a cease-and-desist order under Section 8(b)(4)(D) is in conflict with the decision of the Fifth Circuit in *National Labor Relations Board v. Local 450, International Union of Operating Engineers, AFL-CIO*, decided February 18, 1960, 45 LRRM 2765 (a copy of the opinion is set forth in Appendix C, *infra*, pp. 20-31). There the court held (*infra*, p. 30), that "where, as here, an employer has assigned work to an employee and a labor organization does any of the acts proscribed by Section 8(b)(4)(D), the Board is not required, as a part of its determination of the dispute, to make an adjudication as between the employer and the labor organization assigning the work to one or the other as a prerequisite to the granting of 10(c) re-

lief * * *." In so holding, the court specifically recognized (*infra*, pp. 26-27) that its decision was contrary to the instant case, and also was contrary to the decisions of the Third and Seventh Circuits (which the court below followed) in *National Labor Relations Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428*, 242 F. 2d 722 (C.A. 3), and *National Labor Relations Board v. United Brotherhood of Carpenters and Joiners of America*, 261 F. 2d 166 (C.A. 7).

This Court should resolve the conflict, since it involves "an important question concerning the Board's statutory duty in dealing with jurisdictional disputes" (*Plumbing and Pipefitting case, supra*, p. 724). Since the enactment of Section 10(k) as part of the Labor-Management Relations Act of 1947, the Board consistently has held that, absent a Board order or certification, or a contract determining the bargaining representative for employees performing the work involved in the dispute, the employer's work assignment will be accepted. Accordingly, the Board ordinarily has refused in Section 10(k) proceedings to disturb the employer's assignment of the work and to make an arbitration-type award of the disputed work on the basis of such factors as custom, tradition, pattern of employment, etc. In its view, a strike to override the employer's assignment of the work, save in the exceptions noted, violates Section 8(b)(4)(D).³

³ *Moore Drydock*, 81 NLRB 1108 (1949); *Juneau Spruce*, 82 NLRB 650 (1949); *Los Angeles Building and Construc-*

In the twelve years since the enactment of the amended Act, the Board has conducted more than 100 Section 10(k) hearings on this basis, and almost 1200 charges alleging violation of Section 8(b)(4)(D) have been filed with the Board. The decision below overturns this settled administrative practice, and would require the Board to make the kind of work award in a Section 10(k) proceeding which, it believes, Congress did not intend it to make and which, in accordance with that view, it has heretofore consistently refrained from making.

CONCLUSION

In view of the express conflict of decisions on an issue of substantial importance in the administration of the National Labor Relations Act, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MELVIN J. WELLES,
Attorney,
National Labor Relations Board.

APRIL 1960.

tion Trades Council, etc. [Westinghouse], 83 NLRB 477 (1949); Newark & Essex Plastering Co., 121 NLRB 1094 (1958); National Labor Relations Board Fourteenth Annual Report (1949), pp. 99-104; Twentieth Annual Report (1955), pp. 115-120; Twenty-second Annual Report (1957), pp. 108-113.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24—October Term, 1959

(Argued October 16, 1959, Decided December 3, 1959)
Docket No. 25573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, RESPONDENT

Before CLARK, *Chief Judge*, MOORE, *Circuit Judge*,
and J. JOSEPH SMITH, *District Judge*.

The National Labor Relations Board petitions for enforcement of a cease and desist order it has entered against the respondent union on a finding of unfair labor practices. 121 N. L. R. B. No. 158. An earlier decision concerning this matter is reported at 119 N. L. R. B. 954. Enforcement denied.

CLARK, *Chief Judge*:

The National Labor Relations Board petitions for enforcement of its order that the respondent union (IBEW) cease and desist from conduct found to constitute an unfair labor practice under §8(b)(4)(D),

29 U. S. C. §158(b)(4)(D), the "jurisdictional dispute" provision of the Labor-Management Relations Act of 1947. Briefly stated, the underlying dispute is between the respondent union and an IATSE local¹ over assignment by the Columbia Broadcasting System of lighting work in connection with certain "remote" television broadcasts, i.e., those not originating in the company's home studios. This continuing dispute has necessitated the cancellation of several telecasts following work stoppages by one of the unions when lighting work was assigned to the other. The present proceeding arises from such an incident instigated by respondent's refusal to operate the camera equipment unless it also performed the program's lighting tasks.

For purposes of this enforcement proceeding, respondent concedes its violation of §8(b)(4)(D). But it contends that the Board failed to comply with the special procedure prescribed by §10(k), 29 U. S. C. §160(k).² This section provides that when an unfair

¹ Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO.

² Sec. 10(k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

labor practice is charged under §8(b)(4)(D), "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen," with an exception not here involved encouraging voluntary adjustment of the dispute. The Board concedes that a determination under this section is a prerequisite to the issuance of a cease and desist order, but contends that its hearing and finding fulfilled the requirement.

Thus the only question involves the construction of the statutory direction to "determine the dispute." The Board's position is that its finding that the respondent had no claim by contract, order, or certification to the disputed work suffices, while respondent maintains that the Board is required affirmatively to allocate the work to one of the competing unions. This issue has been resolved against the Board by the Third and Seventh Circuits. See *N. L. R. B. v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of U. S. and Canada Locals 420 and 428, AFL (Hake)*, 3 Cir., 242 F. 2d 722; *N. L. R. B. v. United Brotherhood of Carpenters and Joiners of America, AFL (Wendnagel)*, 7 Cir., 261 F. 2d 166. But the Board has adhered to its position, although it has not sought certiorari to resolve the dispute.

We turn first to an examination of the statutory language. The scheme of §10(k) is to provide an opportunity for the private adjustment of disputes causing jurisdictional strikes; but in the absence of such adjustment, the Board itself is to determine the disputes. It is difficult to attribute any meaning to the word "dispute" unless it refers to the controversy between the unions as to which is entitled to the work. It also seems clear that the Board's function is to impose a settlement in the event that the parties are

unable themselves to reach agreement. Since private adjustment can only envision agreement as to which group is entitled to the work, the Board is required to make this determination where private negotiation proves unsuccessful. Further, under the Board's view that Congress has left the determination of disputes involving work assignments to the employer, the §10(k) hearing and determination become superfluous. Private settlement would be equally encouraged by a provision for a 10-day notice in advance of an unfair labor practice proceeding.

Although the language of the enactment is unambiguous, the legislative history is not thereby rendered immaterial. But since Judge Hastie in the *Hake* case, *supra*, 3 Cir., 242 F. 2d 722, has fully reviewed this history, we shall content ourselves with a brief summarization. The original provision, as adopted by the Senate, would have settled jurisdictional disputes by compulsory arbitration before a Board-appointed arbitrator or in the alternative through adjudication by the Board itself. S. 1126, 80th Cong., 1st Sess. (1947). But the arbitration clause was deleted in conference committee, so that the bill as enacted prescribed Board determination alone. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 57 (1947). The discussion of these provisions on the floor and in committee reports leaves no doubt that the Congress contemplated affirmative Board adjudication of disputed work allotments. See *Hake*, *supra*, 3 Cir., 242 F. 2d 722, 725; 71 Harv. L. Rev. 1364, 1366 (1958).

The Board urges that its policy has encouraged the voluntary settlement of jurisdictional disputes and thus has refuted the fears of those who opposed passage of §10(k) on the ground that it would encourage rather than prevent strikes. Such apprehension

not only was expressed in the Congress, but also constituted one of the grounds for the Presidential veto. See 93 Cong. Rec. 6452-6453, 6506, 7486. But this line of argument in effect admits that the Board's construction of the Congressional mandate does not conform to the understanding expressed by opponents, as well as proponents, of the section. Since the provision has not been effectuated as enacted, whether or not jurisdictional strikes will be encouraged remains as speculative today as it was in 1947. Since Congress chose to disregard this risk, it is not for the courts or the Board to accord it greater weight. It might also be noted in passing that during the pendency of the present case, another telecast was cancelled because of picketing by the IATSE when the disputed lighting work was assigned to respondent. Thus the prospect of voluntary settlement seems somewhat remote.

The Board also relies on arguments based on the internal consistency of the Act's provisions. Thus it cites §303(a)(4), which contains language substantially identical to that of §8(b)(4)(D), but which by virtue of §303(b) grants an independent action for damages to those injured by jurisdictional disputes. The Board asserts that an incongruous result is reached if damages may be assessed under §303(a)(4), although the union may be found entitled to the work by virtue of an affirmative allocation under §10(k). In this respect reliance is placed on *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 9 Cir., 189 F. 2d 177, affirmed 342 U. S. 237. While there is language in the opinion of the Ninth Circuit which supports the Board's position,³ the Supreme Court's decision rests on the

³ "[U]nder the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceed-

premise that the two sections are not to be construed *in pari materia*. It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process.

A conflict is also alleged to exist between an affirmative award of work jurisdiction and the provisions of §§8(a)(3) and 8(b)(2) which protect employees from discrimination because of their union membership or lack thereof. The Board notes its agreement with the suggestion by Judge Hastie in the *Hake* case, *supra*, 3 Cir., 242 F. 2d 722, that a §10(k) determination would not be binding on the employer; but it asserts that the determination "would presumptively authorize that union 'to cause or attempt to cause the employer to discriminate against the incumbent employees to whom he has assigned the work.'" But in view of the nature of the disputed tasks here involved it is improbable that any employees will be displaced. Even assuming such displacement, Congress has apparently adjudged that this interest is outweighed by the policy of settling jurisdictional disputes. Further, the same result would seem to be effected by the Board's determination of disputes involving the scope of bargaining units. See *Local 26 (Winslow Bros. & Smith Co.)*, 90 N. L. R. B. 1379; *Amalgamated Meat Cutters & Butcher Workmen (Safeway Stores, Inc.)*, 101 N. L. R. B. 181; *National Association of Broadcast Engineers & Technicians (American Broadcasting-Paramount Pictures)*, 110 N. L. R. B. 1233.

The Board's suggestion that the result here reached would "erect an almost insuperable obstacle" to the

ing could make a determination adverse to the assignment of the work by [the employer]." 9 Cir., 189 F. 2d 177, 188.

issuance of injunctive relief under §10(1) is adequately answered by *Alpert v. International Brotherhood of Electrical Workers, Local No. 90, AFL-CIO*, D. C. Conn., 163 F. Supp. 774. Reliance is also placed on the lack of statutory standards on which to base an affirmative determination. But the relevant criteria have been suggested by Board Member Murdock, dissenting in *Local 562 (Northwest Heating Company)*, 107 N. L. R. B. 542, 554.

It may be that the Board's assertions would be more persuasive if the intent of Congress were unclear. Note, however, Professor Cox's testimony that the Board's practice "is unsound whether it is required by the statute or results from misapplication." Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947, Senate Committee on Labor & Public Welfare, 83d Cong., 1st Sess., pt. 4, pages 2428-2431 (1953). It is also instructive that there seems to have been no compliance with the Board's own rules, which recognize its power to allocate disputed tasks. This was the ground on which enforcement was refused by the Seventh Circuit in the *Wendnagel* case, *supra*, 7 Cir., 261 F. 2d 166. Our attention has been directed to the fact that these rules have been "rephrased" subsequent to the hearing herein; but, as the Board itself notes, its rules are immaterial unless they comply with the statutory scheme.

In view of the unambiguous language of §10(k), and supported as it is by the legislative history and the precedents, we are convinced that the Board's present position contravenes the statutory direction.

Accordingly, the petition for enforcement is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, RESPONDENT

DECREE

Before CLARK, MOORE, *Circuit Judges*, & SMITH,
District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on October 9, 1958. The Court heard argument of respective counsel on October 16, 1959, and has considered the briefs and transcript of record filed in this cause. On December 3, 1959, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board directed against Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Elec-

trical Workers, AFL-CIO, its officers, representatives, agents, successors and assigns, be and it hereby is denied.

CHARLES E. CLARK
Judge, United States Court of
Appeals for the Second Circuit

LEONARD P. MOORE
Judge, United States Court of
Appeals for the Second Circuit

A true copy,

/s/ A. Daniel Fusaro
Clerk

Filed: December 28, 1959

APPENDIX C

J-2634

Loc. 450, Int'l Union of Operating Engineers
(Shine Industrial Painters)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17789

NATIONAL LABOR RELATIONS BOARD, PETITIONER
(Shine Industrial Painters—Employer)

v.

LOCAL 450, INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO, RESPONDENT

Petition for Enforcement of an Order of the National
Labor Relations Board, sitting at Washington, D. C.*

(February 18, 1960)

Before TUTTLE, CAMERON and WISDOM, *Circuit
Judges.*

TUTTLE, *Circuit Judge*: This case is before the
Court upon the petition of the National Labor Rela-
tions Board for enforcement of its order issued
against respondent on March 3, 1959. The Board's

* 39-CD-25; 119 NLRB 1725

Decision and Order in the unfair labor practice proceeding are reported at 123 N.L.R.B. 2. The Board's earlier Decision and Determination of Dispute relating to the instant matter is reported at 119 N.L.R.B. 1725. This Court has jurisdiction of the proceedings under Section 10(e) of the Act, the unfair labor practices having occurred at Texas City, Texas, where Sline Industrial Painters, herein called Sline (the employer here involved), was engaged in construction work affecting interstate commerce.

The Board found that respondent violated Section 8(b) (4) (D) of the Act¹ by inducing and encouraging employees to cease work for the purpose of requiring Sline to assign the work of operating an air compressor to a member of respondent rather than to other Sline employees. The Board's finding was based on the following statement of facts, which respondent says "is substantially correct."

In April 1957, Sline was engaged in construction and maintenance painting at the Monsanto plant in Texas City, Texas. In connection with its work Sline used an air compressor which was virtually automatic, but required manual starting and stopping by

¹ 79 U.S.C.A. 158(b) (4) (D) provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is: . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."

turning a key, work involving only about a minute each day. Sline followed the general practice of having employees nearest the compressor start and stop it. On April 2 respondent's steward, Bud Miller,² had asked Leslie May (Sline's superintendent) if he was going to hire an operating engineer for the compressor, and May replied that he was not. Miller called this to the attention of Searcy, respondent's business representative, who thereafter attempted to get Sline to hire an engineer, and told the operating engineers employed by Tampco to delay reporting for work the morning of April 3. Searcy then spoke to Donovan, Monsanto's superintendent, and asked him to help persuade Sline to hire an engineer. Believing that Donovan would get the matter straightened out, Searcy instructed Tampco's operating engineers to report for work. Meanwhile, also on April 3, May instructed Combre, a member of Painters' Local 585, who happened to be nearby, to start the compressor, and May made Combre responsible for starting the compressor thereafter.

Later in the morning of April 3 Donovan told Searcy he was not able to help him. Shortly thereafter, Piangenti, timekeeper for Tampco, received two calls at Tampco's field office for Miller. Miller was not then available, and a message was left to have him call Searcy at respondent's local hiring hall. Accordingly, when Miller came to Tampco's office shortly before noon, he called Searcy. After completing the call, Miller told Piangenti that Searcy had told him of the lack of success and that "we are going in at noon." At Piangenti's request, Miller

² Miller was employed by Tampco Piping, Inc., herein called Tampco, another contractor working at the Monsanto plant.

agreed to have the operating engineers shut down their equipment in the field and bring in their trucks before punching out. Miller added that it was the "same old story, same old thing." At about 12:30 P.M., the four operating engineers employed by Tampco checked out, and they did not return to work that afternoon.

The next day Tampco notified the National Joint Board for Settlement of Jurisdictional Disputes that the respondent had called a strike against Tampco because of a dispute with Sline over assignment of an operator for the air compressor. On April 9, Chairman Dunlop of the Joint Board directed the International Union of Operating Engineers to instruct respondent to have the employees return to work and either adjust the dispute directly with the Painters or process any complaint in accordance with Joint Board procedures. Dunlop, in the erroneous belief that Tampco was a subcontractor of Sline, requested both Sline and Tampco to send a complete description of the disputed work to the Joint Board. In a later letter Dunlop directed Sline to proceed with the work as originally assigned pending the Joint Board's decision. On May 2, Sline sent the requested description to the Joint Board. On May 6, the Joint Board, having learned for the first time that Tampco was not involved in the dispute, informed the interested parties that, because of the previous misunderstanding, the Operating Engineers, the Electricians, and the affected contractors were being asked whether they wished to present any further statements to the Joint Board before it rendered its decision. Sline did not respond to this letter. On May 10, the Joint Board awarded the disputed work to respondent. Sline then protested that the Joint Board should not have assumed jurisdiction because Sline had not sub-

mitted the dispute to it. Chairman Dunlop replied that the Joint Board decided the dispute "on its own motion," pointing out that no party had objected to the Joint Board's contemplated action when it requested the parties to state their positions.

The unfair labor practice charges filed in April 1957 alleged that respondent had violated Section 8(b)(4)(D), the "jurisdictional disputes" section of the statute. Pursuant to the statutory scheme for the handling of jurisdictional disputes, the Board in July 1957 held the hearing prescribed by Section 10(k) (29 U.S.C.A. §160(k)) to "hear and determine the dispute out of which the charge of a Section 8(b)(4)(D) violation arose."³

The Board found, on the basis of the facts set forth, that Sline's assignment of the disputed work to a member of the Painters, was not in contravention of an order or certification of the Board, and that respondent had no contract with Sline that bound Sline to assign the disputed work to its members. The Board also found that the evidence was insufficient to establish that Sline had submitted or acquiesced in the submission of the dispute to the Joint Board or that Sline was bound by the Joint Board's determination. Under these circumstances, the Board found

³ The relevant provisions of Section 10(k) are:

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they had adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. . . ." 29 U.S.C.A. §160(k).

that respondent was not lawfully entitled to force or require Sline to assign the operation of the air compressor to its members rather than to other Sline employees.

Accordingly, the Board directed respondent to notify the Regional Director within 10 days whether it would comply with the Board's determination.

The respondent having refused to comply with the Board's direction, the General Counsel of the Board, on June 3, 1958, issued a complaint alleging a violation of Section 8(b)(4)(D) of the Act. Included in the evidence adduced at the ensuing unfair labor practice hearing were the official records of the prior Section 10(k) proceeding.

Upon the evidence thus adduced, the Board concluded, affirming the Trial Examiner, that respondent violated Section 8(b)(4)(D) by striking, and inducing employees of Tampco to engage in a strike, with an object of forcing or requiring Sline to assign certain work to members of respondent rather than to other Sline employees.

The Board's order requires respondent to cease and desist from engaging in, or inducing or encouraging the employees of Tampco or any other employer, to engage in a strike, or other proscribed conduct, where an object thereof is to force or require Sline to assign particular work to members of the respondent union rather than to other employees except insofar as such action is permitted under Section 8(b)(4)(D). Affirmatively, the order directs respondent to post appropriate notices and to notify the Board's Regional Director what steps have been taken to comply with the order.

Although there are several subsidiary questions raised by respondents, their principal contention is that when such a complaint is filed, charging an un-

fair labor practice under the jurisdictional strike provisions of the Act, the Board is under the duty under Section 10(k) to consider the claims of the striking union to the work in question (here the right to turn on and off the compressor motor), consider the contention of the other party, here the employer Sline, and decide whether the striking union should be awarded the work or the employer be left free to assign it as he sees fit. This, respondent says, is required by the language of the section that says "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen." The Board, to the contrary, says that it is not required to resolve this dispute, that is, in effect engage in compulsory arbitration as between the parties, but may, as it did here, determine only whether the employer was under contract with respondent requiring him to assign the work to it or whether Sline's assignment of the work to its painter employee was in contravention of an order or certification by the Board.

We agree with the position of the Board, and hold that the failure of the Board to make a decision assigning the task of turning the compressor engine on and off either to the painter employee or to respondent does not invalidate its subsequent proceeding resulting in the complained-of injunction. We arrive at this conclusion with the greatest deference to the views of the Courts of Appeals for the Third, Seventh and Second Circuits, with whose judgments to the contrary we cannot agree. See *N.L.R.B. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428* (3 Cir.), 242 F. 2d 722; *N.L.R.B. v. United Brotherhood of Carpenters and Joiners of America*, (7 Cir.) 261 F. 2d 166; and *N.L.R.B. v. Radio &*

Television Broadcast Engineers Union Local 1212,
(2 Cir.) F. 2d

In construing the language of Section 10(k) the first comment we think must be made as to respondent's contention that it is to be construed as setting up a rule of substantive law requiring compulsory arbitration by the Board as between an employer who has exercised his clearly guaranteed right of assigning work to any employee he chooses and a union which simply demands the job for one of its members is that the language is strange language, indeed, to import into the procedural section of the Labor Act such a revolutionary concept. This would mean that whenever an employer is using one of his employees, either skilled or unskilled, to perform a job (even though it be one requiring only *one minute* a day as was true here) and a labor organization wishes to compel him to hire one of its members to perform the job it can, notwithstanding the clear substantive declaration of Section 8(b)(4)(D) that it is an unfair labor practice for such union to "strike . . . when an object thereof is . . . forcing or requiring any employer to assign any particular work to" its employees, go out on strike, force a Section 10(k) hearing and require the Board to settle "the dispute," i.e., decide whether it or the employer should be entitled to assign an employee to the job.

Such a construction being utterly inconsistent with the entire purpose of the substantive provisions of the law, we think that the language should not be so construed unless no other reasonable construction can be made. The Board has construed this provision to mean that where there has been an assignment of the work in question by an employer, the Board's "determination of the dispute" is complete when it ascertains whether such an assignment by the employer

is in violation of a contract by which the employer is bound or is in contravention of an order or certification of the Board. In view of the language of Section 8(b) (4) (D), which prevents such a strike from being an unfair labor practice if "such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work," and in view of the fact that a breach of a contract to permit the striking union to assign an employee to the job might arguably prevent the strike from being an unfair labor practice, it seems clear that the ascertainment whether the employer was in violation of a contract, or in contravention of an order or certification of the Board is comprehended in the terms "determine the dispute." We therefore think that the finding made here by the Board to the effect that Sline's assignment of the work to the painters was not in contravention of an order or certification of the Board, and that respondent had no contract with Sline that bound Sline to assign the work to its members was a determination of "the dispute out of which such unfair labor practice [arose]."

In the first of the cases construing Section 10(k) as requiring compulsory arbitration, the court recognized that such construction may make the section "seem anomalous" when considered in the light of the clear prohibition of Section 8(a) (3) of the Act. See *N.L.R.B. v. United Association of Journeymen*, 242 F. 2d 722, 727, where the court said:

"Moreover, we do not believe that the plain requirement of Section 10(k) should be disregarded even though another provision of the statute may make it seem anomalous." (Emphasis added)

With deference, we do not consider the plain meaning of Section 10(k) to be as there held by the court; thus we think the fact that the construction given to it brings it in conflict with other provisions of the statute is strongly persuasive of the need for finding a different meaning for the words. We think this is even clearer because Section 8(b)(4)(D) and Section 8(a)(3) are substantive sections clearly outlining what shall be considered to be unfair labor practices, whereas everything in Section 10 is procedural in nature. It would be extremely strange if what the act proscribed in Section 8 as an unfair labor practice should be made to lose its illegal character by proceedings designed in Section 10 to provide means for calling sanctions into play.

We note that the Supreme Court in *International Longshoremen's and Warehousemen's Union v. Ju-neau Spruce Corp.*, 342 U.S. 237, at 243 says:

"Section 8(b)(4)(D) and Section 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; Section 303(a)(4) to a judgment for damages."

Yet the Supreme Court expressly in that case ruled that a suit for damages for the very kind of strike as was charged here can be maintained without any Section 10(k) hearing. This is strongly persuasive, we think, that the requirements of 10(k) are purely procedural, for it seems highly unlikely that Congress would enact a statute permitting an aggrieved person to sue for damages for a jurisdictional strike, with the quality of the strike finally and irrevocably fixed without any Board determination, and at the same time provide that the same strike would no longer be an unfair labor practice as a basis for seek-

ing injunction if the Board, acting as arbitrator assigned the work to the striking union. Under such a construction the work would have been assigned by the Board to the striking union and no violation of 8(b)(4)(D) would exist, but the employer would still have his right to sue for damages because the strike would still be a violation of 303(a)(4). We conclude that Congress did not intend such an anomaly. We agree with the Court of Appeals for the Ninth Circuit which said:

"Under the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of the work by [the employer]." *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 9 Cir., 189 F. 2d 177, 178.

We conclude that where, as here, an employer has assigned work to an employee and a labor organization does any of the acts proscribed by Section 8(b)(4)(D), the Board is not required, as a part of its determination of the dispute, to make an adjudication as between the employer and the labor organization assigning the work to one or the other as a prerequisite to the granting of 10(c) relief by the Board. This is consistent with the Board's unvarying construction of the statute and is the only construction which in our opinion does not undercut the clearly expressed purpose of the statute to outlaw and eliminate jurisdictional strikes. *United Brotherhood of Carpenters*, 98 NLRB 346, 349-50; *Los Angeles Building Trades Council*, 83 NLRB 477; *International Longshoremen's Union*, 82 NLRB 650, 659-60.

As to the subsidiary questions, we are fully satisfied that the evidence supported the findings of the

Board that the proscribed acts did occur and that there was no consent by Sline to submit the jurisdictional dispute to the Joint Board with authority to settle it.

Moreover, the Board did not err in failing to permit the introduction of additional evidence at the Section 8(b)(4)(D) hearing on the fact issues decided at the 10(k) proceeding. For a further discussion of this point see the companion case decided contemporaneously herewith, No. 17,840.

Petition for enforcement is granted.

ORDER ENFORCED.

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SEP 15 1960

No. 69

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

**J. LEE RANKIN,
Solicitor General,**

Department of Justice, Washington 25, D.C.

**STUART ROTHMAN,
General Counsel,**

**DOMINICK L. MANOLI,
Associate General Counsel,**

**NORTON J. COME,
Assistant General Counsel,**

**MELVIN J. WELLES,
Attorney,
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Washington 25, D.C.**

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 69

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

OPINIONS BELOW

The opinion of the court of appeals (R. 107-112) is reported at 272 F. 2d 713. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 2-14) in the unfair labor practice proceeding are reported at 121 NLRB 1207. The Board's earlier Decision and Determination of Dispute (R. 14-20) is reported at 119 NLRB 594.

JURISDICTION

The court below entered its judgment on December 28, 1959 (R. 113-114). The petition for a writ of certiorari was granted on May 31, 1960, 363 U.S. 802 (R. 114). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:¹

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) * * * to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal * * * to perform any service, where an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

¹ Other provisions of the Act referred to in the Argument, but not directly at issue herein, are set forth in the Appendix, *infra*, pp. 53-56.

Sec. 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

QUESTION PRESENTED

Section 8(b) (4) (D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to strike for the purpose of requiring an employer to assign particular work to employees in one labor organization, trade, craft, or class rather than to those in another, unless the employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Section 10(k) of the Act provides that, when an unfair labor practice under Section 8(b) (4) (D) is charged, the Board must first "hear and determine the dispute" out of which such unfair labor practice arose.

The question presented is whether the Board discharges its duty under Section 10(k) to "determine the dispute" by deciding that the striking union is

not entitled to the work because it has no right to it under either (1) an outstanding Board order or certification, or (2) a collective bargaining agreement, or whether; as the court below held, the Board is required to make an affirmative award of the work between the competing employees.

STATEMENT

A. The Board's findings of fact

In 1952, the Board certified respondent as the bargaining representative of all technicians in certain departments of Columbia Broadcasting System ("CBS") (R. 16; 60). The certification, while enumerating several categories of work, made no mention of remote lighting work (*ibid.*).² On May 1, 1956, respondent and CBS executed a collective bargaining agreement which likewise did not cover these work tasks (R. 16; 61-66). Indeed, CBS, in the pre-contract negotiations rejected a demand by respondent for inclusion of that work, just as it rejected a similar demand by IATSE which represented another group of its employees (R. 16; 27-31). Accordingly, the question of remote lighting assignments remained unresolved (R. 16).

The immediate dispute herein arose out of CBS' planned telecast of the Antoinette Perry Awards,

² Remote lighting work involves the lighting of television broadcasts which do not originate in the company's home studios (R. 16; 21).

³ Local 1 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

scheduled for April 21, 1957, from the Waldorf Astoria Hotel (R. 4; 22-23). On or about April 9, CBS notified respondent that it would assign the remote lighting work for this telecast to its stagehands, who were members of IATSE (R. 4, 16; 21-22).

On April 18, respondent's business manager, Calame, threatened Fitts, vice president of CBS in charge of labor relations, with "trouble" if CBS insisted on assigning the work to IATSE. IBEW International Representative Lighty and respondent's Business Representative Pantell also told Fitts that respondent was entitled to the work and threatened that there would be "trouble" if respondent did not get it (R. 4, 17; 24-26, 41-43).

On the afternoon of April 21, after the IATSE stagehands had installed all necessary lights for that evening's program, the technicians represented by respondent installed duplicate lights (R. 5, 17; 32-34, 54-56). Pantell explained that it was "an IBEW job. If we don't use our lights we are not doing the show" (R. 5, 17; 34, 55-56). CBS Representative Levin advised Pantell that IATSE would operate the lights, and ordered that the duplicate lights be removed. But Bell, as spokesman for the technicians, refused to remove them (R. 5, 17-18; 35-37, 45, 54-57). Pantell called a meeting of the technicians, and thereafter again told CBS that respondent's members would not operate the cameras and necessary incidental equipment if IATSE's lights were used (R. 5, 17; 36-37, 56-60).

The technicians refused to finish installing the necessary equipment, and did not report for the rehearsal scheduled between 6 and 7 p.m. (R. 5, 17-18; 37-38, 57). Finally, at about 10:30 p.m., Levin once more asked the technicians to make pictures, and they again refused (R. 5, 18; 59-60). As a result the scheduled program was cancelled (R. 5, 18; 40).

B. Proceedings before the Board

1. The Section 10(k) proceeding

The unfair labor practice charges, filed in April 1957, alleged that respondent had violated Section 8(b)(4)(D), the "jurisdictional disputes" section of the statute (R. 14-15). Pursuant to the statutory scheme for the handling of jurisdictional disputes, the Board, in June 1957, held the hearing prescribed by Section 10(k) to "hear and determine the dispute" out of which the unfair labor practice charge arose (*ibid.*).

The Board found, on the basis of the facts set forth above, that CBS's assignment of the remote lighting work to its stagehands, who were members of IATSE, was not in contravention of an order or certification of the Board, and that respondent had no contract with CBS that bound CBS to assign the disputed work to its members (R. 18-19). Under these circumstances, the Board found that respondent was not lawfully entitled to force or require CBS to assign remote lighting work to its members rather than to other CBS employees (R. 19).

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The Board directed respondent to notify the Regional Director within ten days whether it would comply with the Board's determination (R. 20).

2. *The unfair labor practice proceeding*

Respondent having refused to comply with the Board's determination (R. 6; 69, 70-71), the General Counsel of the Board, on December 27, 1957, issued a complaint alleging that the strike against CBS violated Section 8(b)(4)(D) of the Act. Included in the evidence adduced at the ensuing unfair labor practice hearing were the official records of the prior Section 10(k) proceeding.

Upon the evidence thus adduced, the Board concluded that respondent violated Section 8(b)(4)(D) by "inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in a strike or a concerted refusal * * * to perform service with an object of forcing or requiring [CBS] to assign the work of operating lights on remote television pickups to members of Local 1212 rather than to members of [IATSE]" (R. 9).

The Board entered an order which requires respondent to cease and desist from engaging in, or inducing or encouraging the employees of CBS to engage in, a strike, or other proscribed conduct, where an object thereof is to force or require CBS to assign particular work to members of the respondent union rather than to other employees, except insofar as such action is permitted under Section 8(b)(4)(D). Affirmatively, the order directs re-

spondent to post appropriate notices of compliance (R. 12-14).

C. The decision of the Court of Appeals

The court below denied enforcement of the Board's order on the ground that Section 10(k) requires the Board affirmatively to allocate the work to one of the competing unions or groups as a prerequisite to the issuance of a cease-and-desist order under Section 8(b)(4)(D). In the court's view, it is not enough for the Board merely to determine that the striking union is not entitled to strike for the work by virtue of a contract, or Board order or certification. Section 10(k), the Court held, contemplates "affirmative Board adjudication of disputed work allotments" and the Board's "function is to impose a settlement in the event that the parties are unable themselves to reach agreement" (R. 107-112).

SUMMARY OF ARGUMENT

Section 8(b)(4)(D) of the Act makes it an unfair labor practice for a labor organization to strike in order to force the employer to change his assignment of work from one group of employees to another group, unless the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Section 10(k) provides that when "it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out

of which such unfair labor practice shall have arisen, unless * * * the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute." The issue here is whether Section 10(k) requires the Board in effect to arbitrate the dispute (as the court below held), or merely to determine whether the striking union is entitled to override the employer's assignment of the work by virtue of an outstanding Board order or certification, or contract, giving it representation rights with respect to employees performing that work. The Board submits that the latter interpretation of Section 10 (k) is the correct one.

A.1. Section 10(k) itself sets forth no standards by which the Board is to determine jurisdictional disputes. Since Section 10(k) is merely a procedural provision it is appropriate to turn to the substantive provision of the Act dealing with jurisdictional disputes (Section 8(b)(4)(D)) for guidance as to a standard. Section 8(b)(4)(D) makes the employer's assignment of the work decisive, unless he "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

The conclusion that this standard, rather than such factors as custom, etc., should govern the Board's determination of the dispute under Section 10(k), is supported by several considerations: First, it is one of the basic premises of the Act that the employer is normally free to decide who his employees shall be and what work they shall perform. Second, were the

Board required in Section 10(k) proceedings to utilize standards other than those specifically set forth in Section 8(b)(4)(D), incongruities would result. Either the 10(k) determination would not constitute a defense to an unfair labor practice proceeding under Section 8(b)(4)(D), in which case the Board's 10(k) determination would be rather pointless, or the plain language of the exception to Section 8(b)(4)(D) would be distorted to permit the procedural provision, 10(k), to modify the substantive provision, 8(b)(4)(D). Third, a further consequence of basing 10(k) determinations on considerations beyond those set forth in 8(b)(4)(D) would be to encourage the very jurisdictional strikes which the Sections were intended to prevent. For unions, by striking and thereby invoking a Section 10(k) proceeding, could obtain rights beyond those afforded by other provisions of the Act. The Board's view of Section 10(k), on the other hand, diminishes the incentive to strike, for the Board is confined to interpreting the effect of a preexisting order or certification, or contract (see p. 22, *infra*), conferring representation rights.

2. Moreover, a Section 10(k) determination in favor of a striking union, based on standards other than those contained in Section 8(b)(4)(D), would permit that union to cause the kind of discrimination proscribed by Sections 8(b)(2) and 8(a)(3) of the Act. The typical situation where a Board order or certification, or a contract, does not cover the striking union's claim to the work is where the latter is an "outside" union which does not represent any of

the employer's employees. To let the outside union's claim to the work prevail on the basis of such factors as custom and tradition, would require the employer to discharge his own employees and replace them with members of the outside union, thereby encouraging membership in the latter in violation of Section 8(a)(3). It is hardly likely that Congress could have intended this result. Indeed, Senator Taft, the chief architect of the 1947 amendments, specifically indicated that Section 8(b)(4)(D) was not intended to supersede the restrictions imposed by Section 8(a)(3). 93 Cong. Rec. 6860, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1624. In addition, to read Section 10(k) as requiring the Board affirmatively to award disputed work to the striking union, even absent representation rights thereto, would virtually negate that portion of Section 8(b)(4)(D) permitting an employer to assign work to an unorganized "trade, craft, or class." As a union would generally tend to prevail over an unorganized group on the basis of such factors as custom and tradition, the union would need only to strike in order to overturn the employer's assignment.

3. The Board's interpretation of Section 10(k) also avoids a conflict with Section 303(a)(4) of the Labor Management Relations Act. That provision makes unlawful, for purposes of a private suit for damages under Section 303(b), the identical conduct that is proscribed as an unfair labor practice under Section 8(b)(4)(D) of the National Labor Relations Act. However, although Sections 8(b)(4)(D) and

303(a)(4) are identical in language and require the same elements of proof, the extra procedural step imposed by Section 10(k) is not applicable to a Section 303(a)(4) proceeding. *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237. If the Board were required under Section 10(k) to give effect to factors in addition to those specified in 8(b)(4)(D) and 303(a)(4), the substantive symmetry between those two sections would be impaired. Under 303(a)(4), a strike in derogation of the employer's assignment of the work would be sufficient to establish a violation, absent an order or certification. But if the Board subsequently found that the striking union was entitled to the work on other grounds, it would be sanctioning conduct which had been declared unlawful under Section 303(a)(4).

B. The Board's reading of Section 10(k), first adopted shortly after the provision was added to the Act in 1947, has been consistently adhered to thereafter. "Such specific and established administrative interpretation of the statute . . . 'should not be overruled except for weighty reasons.'" *Commissioner v. Estate of Sternberger*, 348 U.S. 187, 199. Moreover, Congress was aware of the Board's interpretation, and has in effect ratified it. On several occasions, Congress considered amendments that would have changed the Board's interpretation, but did not adopt them.

C. Finally, the Board's interpretation of Section 10(k) has furthered the basic purpose of that Section. The prime objective of Section 10(k) is to en-

courage the private settlement of jurisdictional disputes by the parties, without resort to the Board's processes. Early in the life of the jurisdictional dispute provisions, the Building and Construction Trades Department of the AFL, the Associated General Contractors of America, and various employer associations set up a National Joint Board for the Settlement of Jurisdictional Disputes, which has been effective in settling such disputes in the building and construction industry. Other efforts, too, have been made to settle these disputes without invoking the Board's processes. Furthermore, the Board's records show that, although over 1,100 cases involving an alleged violation of Section 8(b)(4)(D) were closed from the enactment of Section 10(k) in 1947 to July 1959, in only 95 of these was it necessary for the Board to go to a formal hearing under Section 10(k), and in only 14 of them was it thereafter necessary for the Board to issue an unfair labor practice order.

D. The grounds relied on by the court of appeals do not justify its rejection of the Board's interpretation of Section 10(k).

1. The legislative history of Section 10(k) shows that, as originally introduced, the provision gave the Board authority to appoint an arbitrator to determine the jurisdictional dispute, but subsequently this authority was deleted. From this, the court below concluded that Congress contemplated that the Board itself would exercise the arbitrator's function, making an affirmative award based on all the factors which he would normally consider. However, the inference

that Congress, by deleting the power to appoint an arbitrator, left the Board with the arbitrator's task, was drawn by opponents of the bill, who are usually not a reliable guide as to the meaning of the legislation. An equally plausible inference is that Congress recognized that, for the reasons previously set forth, such an arbitration-like decision would bring Section 10(k) into conflict with Section 8(b)(4)(D) and other provisions of the Act, and therefore confined the Board to determining whether the striking union was entitled to claim the work under an outstanding order or certification. Indeed, the statement of Senator Taft mentioned above confirms this conclusion.

2. The court below also erred in concluding that the Board's view of Section 10(k) renders that proceeding pointless. The Board's experience under this Section, as previously shown, demonstrates that it has served the primary function envisioned for it by Congress. It has, in most cases, obviated the necessity for utilizing the Act's procedures to settle jurisdictional strikes. Moreover, in the cases which have gone to a hearing under Section 10(k), a substantial number have been resolved on the basis thereof, without the need for invoking unfair labor practice proceedings. Thus, the informal, non-adversary 10(k) proceeding, which, like the hearing in a Section 9 representation proceeding, is still a part of the investigatory stage of the case, may show that the conclusions reached earlier in the investigation were erroneous and proceedings under Section 8(b)(4)(D) are therefore unwarranted, or that the dispute had in fact been voluntarily adjusted, or was subject

to such adjustment. And, should the Board make a determination on the "merits," the fact that the parties are afforded an opportunity to abide by the 10 (k) determination before conventional unfair labor practice sanctions are resorted to provides an atmosphere more conducive to settlement than having issues relating to the underlying dispute decided in the 8(b)(4)(D) proceeding itself.

3. Finally, there is no merit to the court's suggestion that the Board's rules provided for an arbitration-type 10(k) determination, and the Board was in any event required to adhere to its own rules. The rules, as they existed at the time of the Section 10 (k) proceeding here, did not in fact provide for an arbitration-type determination. They provided, in pertinent part, that the Board would, after the 10(k) hearing, either "certify the labor organization . . . which shall perform the particular work tasks in issue, or . . . make other disposition of the matter." Particularly when viewed in the light of the gloss placed thereon by the Board's decisions, it is apparent that the reference to "certifying" the labor organization which shall perform the tasks was not intended to encompass an affirmative determination in all cases, but merely the situation where the Board would interpret the scope of a. outstanding Board order or certification, or contract, found to govern the work assignment in question.

ARGUMENT

The Board Satisfies the Requirement In Section 10(k) That It "Hear and Determine the Dispute" Out of Which the Unfair Labor Practice Arose By Ascertaining Whether the Striking Union Is Entitled To the Disputed Work By a Board Order or Certification. Or By a Contract. The Board Is Not Required To Determine, On the Basis of Such Factors As Custom, Tradition, Etc., Which of the Competing Unions Should Get the Work.

Introduction

Section 8(b)(4)(D) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents—

to engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is: * * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. * * *

It is clear, as respondent conceded in the court below (R. 108), that its conduct violated the literal terms of Section 8(b)(4)(D). That is, it struck CBS to force it to assign the remote lighting work to its members rather than to members of IATSE, who were also employees of CBS and who were given the work by their employer. And, although both

respondent and IATSE had collective bargaining agreements with CBS, neither agreement covered the particular lighting work at issue, nor did respondent's certification as representative of CBS' technicians.

The issue here is whether the Board's unfair labor practice finding is invalidated by an asserted failure to satisfy the antecedent requirements prescribed by Section 10(h). That Section reads:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless * * * the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Since the enactment of Section 10(k) in 1947, the Board has consistently held that it satisfies its statutory duty to "hear and determine the dispute" out of which the unfair labor practice arises by ascertaining whether the striking union is entitled to the disputed work by virtue of either an outstanding Board order or certification, or a collective bargaining contract; and that unless one of these conditions is met, the union cannot override the employer's normal right to assign work to employees of its own choosing (see *infra*, pp. 35-40). Applying these set-

tled principles to the facts developed here in the Section 10(k) proceeding, the Board concluded that since respondent had no claim to the remote lighting work under either a Board order of certification, or a contract, it had no right to strike to force or require CBS to assign such work to its members rather than to members of IATSE.

The court of appeals held, however, that this kind of determination does not satisfy the requirements of Section 10(k); that the Section requires the Board to determine on the basis of such factors as custom, tradition, pattern of employment, etc., which of the competing groups should get the work. This view has also been adopted by the Third and Seventh Circuits.⁴ The Board's view, on the other hand, has been explicitly accepted by the Fifth Circuit,⁵ and apparently also by the Ninth.⁶

⁴ *National Labor Relations Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428 (Hake)*, 242 F. 2d 722 (C.A. 3); *National Labor Relations Board v. United Brotherhood of Carpenters and Joiners of America (Wendnagel)*, 261 F. 2d 166 (C.A. 7).

⁵ *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Sline Industrial Painters)*, 275 F. 2d 408; *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Industrial Painters and Sandblasters)*, 275 F. 2d 413; *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Hinote Electric Co.)*, 275 F. 2d 420.

⁶ See *International Longshoremen's Union v. Juneau Spruce Corp.*, 189 F. 2d 177, 188 (C.A. 9), affirmed, 342 U.S. 237.

We shall show that the Board's settled interpretation of Section 10(k) is correct because it harmonizes the various provisions of the Act dealing with jurisdictional disputes, avoids the serious incongruities that would result if the Board were required to make an affirmative award of the work between competing unions, and effectuates the basic purpose of Section 10(k) of facilitating the voluntary adjustment of jurisdictional disputes.

A. The Board's interpretation of Section 10(k) harmonizes the various provisions of the statute.

The statutory phrase "hear and determine the dispute out of which such unfair labor practice shall have arisen" itself provides no standards for the Board to apply in making such determination. Accordingly, resort must be had to "the structure of the statute, and the relation, physical and logical, between its several parts" (*Duparquet Co. v. Evans*, 297 U.S. 216, 218). When Section 10(k) is viewed in its interrelation to the other statutory provisions dealing with jurisdictional disputes we submit that it cannot properly be construed to require the Board to award the work between the competing unions.⁷

⁷ It is significant that, when Congress wanted the Board to consider such matters as custom and tradition, it said so explicitly. Thus, in Section 8(b)(5), where the exaction of certain membership fees found to be discriminatory or excessive is made an unfair labor practice, it is expressly provided that:

In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry

* * *

1. *The interrelation between Sections 10(k) and 8(b)(4)(D)*

Section 10(k) is part of the machinery which the statute prescribes for remedying the unfair labor practice defined in Section 8(b)(4)(D).^{*} When a charge alleging a violation of Section 8(b)(4)(D) is filed and investigation reveals that there is reasonable cause to believe that an unfair labor practice has occurred—viz., that the union is striking to compel the employer to make a change in his assignment of work—a complaint is not immediately issued under Section 10(b), as in the usual unfair labor practice case. Instead, by virtue of the additional procedure provided in Section 10(k), the parties are first afforded an opportunity either voluntarily to adjust the underlying dispute or to agree upon methods for such adjustment, or to have the Board make a determination respecting the dispute. Only if the strike continues in derogation of the voluntary arrangement or the Board's determination, is the conventional unfair labor practice procedure under Section 10(b) resumed, with issuance of a complaint followed ultimately by a Board remedial order. See Secs. 102.89-102.93 of the *Board's Rules and Regulations*, pp. 56-59, *infra*; *Herog v. Parsons*, 181 F. 2d 781 (C.A. D.C.), certiorari denied, 340 U.S. 810.

^{*} This is apparent from the provision itself, which comes into play only "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b);" and from its location in Section 10, which contains the procedures for the prevention of unfair labor practices.

The aim of Section 10(k) is thus to encourage the parties voluntarily to settle the underlying jurisdictional dispute, and, if there is no voluntary settlement or procedure to adjust the dispute, to have the Board make a determination respecting it. The obvious purpose is to avoid the need for applying the slower and harsher conventional unfair labor practice remedies. Where the dispute is voluntarily adjusted or a method therefor exists—and experience has shown that most disputes have been handled in this way (see pp. 43-46, *infra*)—the Board has no occasion to consider the merits of the dispute. It discharges its function under Section 10(k) merely by ascertaining that an adjustment has occurred, or that there is a voluntary procedure by which all parties to the dispute have agreed to be bound.*

Where, however, there is no voluntary adjustment, then the Board itself must determine the dispute. Since Section 8(b)(4)(D) is the substantive provision of the Act dealing with jurisdictional disputes, it is logical to turn to it for guidance as to the substantive standard to be followed by the Board in carrying out the procedure specified in Section 10(k). Section 8(b)(4)(D) makes it an unfair labor prac-

* Indeed, where an agreed-upon method for voluntary adjustment of the dispute exists and it breaks down, the Board will not redetermine the matter under Section 10(k) but will go directly to the conventional unfair labor practice procedures. See *Wood, Wire and Metal Lathers International Union (Acoustical Contractors Ass'n of Cleveland)*, 119 NLRB 1345 (1958); *Local Union No. 9, Wood, Wire, and Metal Lathers International Union (A. W. Lee, Inc.)*, 113 NLRB 947 (1955).

tice for a labor organization to strike to compel an employer to assign particular work to employees in a particular labor organization, "unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." The term "order" as used in the Act means a final order issued in an unfair labor practice proceeding,¹⁰ and a certification is, of course, the culmination of a representation proceeding under Section 9. In short, Section 8(b)(4)(D) permits the union to override the employer's assignment only if it has a right to the work flowing from a Board unfair labor practice order, usually one issued under Section 8(a)(5),¹¹ declaring it to be the representative of the employees performing such work, or a certification having similar effect. And, since the right to particular work may arise from a collective bargaining agreement as well as from a Board order or certification, the Board has construed Section 8(b)(4)(D) as also sanctioning a strike to override an employer's work assignment that contravenes a contract.¹²

¹⁰ See *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401; *Manhattan Construction Co. v. National Labor Relations Board*, 198 F. 2d 320 (C.A. 10).

¹¹ See *National Labor Relations Board v. Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-923 (C.A. 9); *Joy Silk Mills v. National Labor Relations Board*, 185 F. 2d 732, 741-742 (C.A. D.C.), certiorari denied, 341 U.S. 914.

¹² *National Association of Broadcast Engineers and Technicians, CIO*, 105 NLRB 355, 364-365; *Local 173, Wood Wire and Metal Lathers (Newark & Essex Plastering Co.)*, 121 NLRB 1094, 1109, n. 37. See *infra*, p. 38.

The effect of the decision below, however, may be to require the Board, in a Section 10(k) proceeding, to sanction the very conduct that Section 8(b)(4)(D) expressly prohibits. For a striking union which had no claim to the work under a Board order or certification, or a contract, might well establish its right to the work upon the basis of such factors as custom, tradition, etc. If the Board had to make its Section 10(k) determination upon these factors, an award to the striking union would lead to serious incongruities.

On the one hand, it could be held that, despite the Section 10(k) determination upon these factors that a union is entitled to the work, the strike to obtain the work is nevertheless an unfair labor practice—on the ground that it does not come within the narrow categories of strikes permitted by Section 8(b)(4)(D). Under this view, if the employer refuses to accept the Section 10(k) determination, the union could not strike for the work without violating Section 8(b)(4)(D), even though the Board had held that it was entitled to the work. This result would make the entire Section 10(k) proceedings virtually pointless. The alternative possibility is to read Section 8(b)(4)(D) as encompassing, within the category of Board “orders” for violation of which a strike is permissible, the Board determination in the Section 10(k) proceedings. But the validity of a jurisdictional strike necessarily depends upon the situation that exists when the strike occurs, and a strike that is illegal at the outset cannot be retroactively validated by a subsequent Board Section 10(k) deter-

mination. For it is Congress, ~~and not the Board~~, that has prescribed which jurisdictional strikes are permissible. Moreover, the term "order" used in Section 8(b)(4)(D) has a specialized meaning under the Act, i.e., an order entered in an unfair labor practice proceeding (p. 22, *supra*), and thus cannot fairly be expanded to include a Section 10(k) "determination." Finally, had Congress intended in the 1947 Act to change the substantive content of Section 8(b)(4)(D), it would presumably have done so directly, and not indirectly through a procedural provision. The Board's interpretation of Section 10(k) not only avoids these problems but, as we show (*infra*, pp. 43-46), effectuates the basic policy of the Act's jurisdictional dispute provisions of encouraging and facilitating informal settlement of such disputes.

Other important policy considerations also support the Board's position. The employer is usually in the best position to judge which employees are qualified to perform a particular job, and what would constitute the most efficient utilization of his total work force. Indeed, it is one of the basic premises of the Act that the employer is normally free to decide who his employees shall be and what work he shall give them.¹³ "Apart from the restrictions contained in the provisions of the statute relating to employer unfair labor practices, neither the original Act nor the

¹³ See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132; *National Labor Relations Board v. Local 1229, Electrical Workers*, 346 U.S. 464, 474.

amended Act was intended to limit the employer's exercise of these powers." *Local 173, Wood, Wire and Metal Lathers' Union (Newark & Essex Plastering Co.)*, 121 NLRB 1094, 1109.

Furthermore, to permit a Section 10(k) determination to be based on considerations in addition to those set forth in Section 8(b)(4)(D), would encourage the very jurisdictional strikes which the Sections were intended to prevent. For "unions would strike in order to invoke a proceeding under Section 10(k), and thus obtain, by a favorable determination, work assignment rights not afforded them by other provisions of the statute." *Local 173, supra*, 121 NLRB at 1112. On the other hand, if the Board's function under Section 10(k) were confined to interpreting the effect of an order or certification conferring representation rights, the incentive to strike would be diminished. As Senator Taft emphasized, in reply to the President's veto of the bill, which was subsequently overridden (93 Cong. Rec. A-3043, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1627):

The President says the bill would force unions to strike if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This is not so. All the union has to do is to file a petition under the representation section.

In sum, as the Fifth Circuit concluded in *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Sline Industrial Painters)*, 275 F. 2d 408, 412, a construction that

Section 10(k) empowers the Board to go beyond the standard set forth in Section 8(b)(4)(D), "being utterly inconsistent with the entire purpose of the substantive provisions of the law, we think that the language should not be so construed unless no other reasonable construction can be made." And, as we now show, such a construction would collide with other sections of the Act. •

2. Sections 8(a)(3) and 8(b)(2)

The typical situation where a Board order or certification, or a contract, does not cover the striking union's claim to the work is where the latter is an "outside" union which does not represent any of the employer's employees.¹⁴ For example, an employer, whose employees are represented by Union A, is given a contract to perform certain work; Union B, claiming that its members are entitled to the work by custom or tradition, puts various pressures (picketing, etc.) on the employer to obtain the job. To let custom and tradition be the test and thus permit Union B's claim to prevail, would require the em-

¹⁴ See e.g., *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108; *International Longshoremen's and Warehousemen's Union; Local No. 16 (Juneau Spruce Corp.)*, 82 NLRB 650; *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 82 NLRB 916. The fact that the instant case is one where both of the unions involved represented groups of CBS' employees, does not, as the court below suggested (R. 111), impair the analysis in the text for the usual, rather than the unusual case, should determine the governing principles.

ployer either to discharge his own employees and replace them with employees who are members of Union B, or to abandon the job altogether. Either of these alternatives would cause the employer's employees to be discriminated against because of their membership in Union A, and thereby tend to encourage membership in Union B. Such a result is proscribed by Sections 8(a) (3) and 8(b) (2) of the Act (*infra*, pp. 53-54).

It is anomalous to attribute to Congress the intention to permit the Board to foster through Section 10(k) proceedings the discrimination which the Act was designed to prevent.¹⁵ On the contrary, there is evidence that Congress had no such intention. Thus, as it originally appeared in the Senate Bill, Section 8(b) (4) (D) merely banned strikes to force an em-

¹⁵ The Third Circuit conceded that Sections 8(a) (3) and 8(b) (2) make its contrary view of the Board's duty under Section 10(k) "seem anomalous." *National Labor Relations Board v. United Association of Journeymen*, 242 F. 2d 722, 727. Nor is the anomaly diminished by the explanation of the court below (R. 111) that employees are affected even when the Board, in interpreting a certification or contract under Section 10(k), finds that the work belongs in one bargaining unit rather than another. In such a situation the Board's determination does not license an illegal discrimination, for Section 9 authorizes the union selected by the majority of the employees in an appropriate unit to be the exclusive representative for that unit and the Board's interpretation merely gives effect to the result which Section 9 has previously ordained. Moreover, a union can act as exclusive representative for a particular unit without causing discrimination, for it may undertake to represent the employees already assigned to the work without requiring them to become union members.

ployer "to assign to members of a particular labor organization work tasks assigned * * * to members of some other labor organization."¹⁶ In conference, the provision was expanded to include disputes over work assignments to "a particular trade, craft, or class"—an addition which was criticized on the ground that it would enable an employer to undermine craft unions in the plant by assigning work to unorganized groups of employees.¹⁷ In a supplementary analysis of the Conference Bill, Senator Taft, answering this criticism, stated as follows: ¹⁸

this is not a proper criticism of this section since under the Labor Relations Act at the present time an employer would be violating subsection 8(3) if he discharged or discriminated against some employees merely to provide work to members of a union * * *. If an employer discriminates in the assignment of work so as to encourage a non-union group by assigning them work which properly should be performed by union employees, it would be an unfair labor practice under the provisions of existing law and the conference bill. In other words *all that this amendment to the Senate bill does is to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by operation of section 8(3) of the present Wagner Act.* [Emphasis added.]

¹⁶ Sec. 8(b)(4)(4) of S. 1126, as reported, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 113.

¹⁷ 93 Cong. Rec. 6503, 6513-6514, Leg. Hist. 1579, 1589.

¹⁸ 93 Cong. Rec. 6860, Leg. Hist. 1624.

It should also be noted that, if factors such as custom or tradition were to be relevant in a Board determination under Section 10(k), the amendment to Section 8(b)(4)(D) permitting an employer to assign work to an unorganized "trade, craft, or class" could be seriously weakened. For, on the basis of those factors, a union would generally tend to prevail over an unorganized group. Hence, where work was assigned to an unorganized group,¹⁹ a union would need only to strike in order to overturn the employer's assignment.

3. Section 303(a)(4)

So far as relevant here, Section 303(a)(4) of Title III of the Labor Management Relations Act of 1947 provides that:

It shall be unlawful for the purposes of this section only,²⁰ in an industry or activity affecting commerce, for any labor organization to engage in * * * a strike * * * where an object thereof is—

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another

¹⁹ See *William Fargo, Business Agent, Local 30, United Brotherhood of Carpenters (New London Mills)*, 91 NLRB 1003 (1950).

²⁰ The phrase "for purposes of this section only" was included to avoid any possibility that persons violating the Section could be prosecuted under federal conspiracy statutes. 93 Cong. Rec. 4859-4860, Leg. Hist. 1373-1374.

labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. * * *

Section 303(b), in turn, gives a right to anyone injured by such conduct to sue for damages in the district courts of the United States.

It was not coincidence that the language of Section 303(a)(4) is identical with that of Section 8(b)(4)(D). The legislative history shows that Congress intended that Section 303 would give "persons injured by boycotts and jurisdictional disputes described in the new section 8(b)(4) of the National Labor Relations Act a right to sue the labor organization responsible therefor * * *." H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 67, Leg. Hist. 571. See also, 93 Cong. Rec. 4858, Leg. Hist. 1371. Congress, in Section 303(a)(4), was not creating a new or different violation of law, but was merely adding an additional remedy of damages for the conduct proscribed in Section 8(b)(4)(D), which was subject to a Board cease-and-desist order and a temporary injunction.

The relation between the two provisions is shown by *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237. There the employer assigned certain work to members of the Woodworkers Union, with whom it had negotiated a collective bargaining contract. The Longshoremen's Union, an "outside" union, demanded that its members be as-

signed this work, and, when the employer refused, the Longshoremen began to picket the plant. The employer filed charges with the Board alleging a violation of Section 8(b)(4)(D), and sued for damages in a district court under Section 303(a)(4).

The Board, in its determination of the dispute pursuant to Section 10(k), found there, as here, that, since the striking union was not entitled to the work under an outstanding Board order or certification, or contract, it had no lawful right to force or require the employer to assign the work to its members (82 NLRB 650, 660). In doing so the Board stated the governing consideration which has consistently been its guide in subsequent cases (p. 660):

As we read Sections 8(b)(4)(D) and 10(k), these sections do not deprive an employer of the right to assign work to his own employees; nor were they intended to interfere with an employer's freedom to hire, subject only to the requirement against discrimination as contained in Section 8(a)(3). In the instant case, where a union with no bargaining or any representative status made demands on the Company for the assignment of work to its members to the exclusion of the Company's own employees, the question of tradition or custom in the industry is irrelevant.

In the meantime, the District Court had awarded the employer damages for the strike, on the ground that it violated Section 303(a)(4). The striking union appealed to the Ninth Circuit, contending that its picketing could not be held illegal under Section 303(a)(4) until the Board had first made a deter-

mination as to who was entitled to the work, under Section 10(k), and had found the picketing to constitute an unfair labor practice under Section 8(b)(4)(D). The Union argued further that, if damage actions were permitted prior to such a Board determination under Section 10(k), it might lead to the incongruous result of permitting damages to be assessed under Section 303(a)(4) for conduct which the Board might later find did not violate Section 8(b)(4)(D). The Ninth Circuit rejected this contention and sustained the judgment of the District Court on the ground that the damage remedy was not dependent on the Board remedy. Citing the passage quoted above, the Ninth Circuit pointed out, however, that the incongruous results feared by the striking union were unlikely since the Board's position respecting its function under Section 10(k) was harmonious with the provisions of Section 8(b)(4)(D) and Section 303(a)(4), i.e., it would not override the employer's assignment absent a failure to conform to a Board order or certification determining the striking union to be the representative of employees performing the work in dispute. Indeed, the Court added (189 F. 2d 177, at 188):

* * * under the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of the work by [the employer].

The striking union then brought the case to this Court, which affirmed the Ninth Circuit. The Court stated (342 U.S. at 243-244):

Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4) to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other * * *. The fact that the Board must first attempt to resolve the dispute by means of a § 10(k) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power * * *. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in § 303(a)(4). * * *

The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work "to employees in a particular labor organization" rather than to employees "in another labor organization" or in another "class."
* * *

The Court concluded with these words (at 245):

Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense of employers has been condemned by the Act. Whether that condemnation was wise or unwise is not our concern. It represents national policy which has *both administrative and conventional legal sanctions*. [Emphasis supplied.]

From the foregoing, it would appear that, contrary to the view of the court below (R. 111), this Court regards the substantive content of Sections 8(b)(4)(D) and 303(a)(4) as *in pari materia*, i.e., both require the same elements of proof to establish violation. However, before the Board may exercise its remedial power, it must, unlike the court in a 303(a)(4) proceeding, first go through the extra procedural step imposed by Section 10(k). This substantive symmetry between 8(b)(4)(D) and 303(a)(4) would be impaired if the Board were required under Section 10(k) to give effect to factors in addition to those specified in 8(b)(4)(D) and 303(a)(4), viz., whether the striking union is entitled to the work under a Board order or certification. For, under Section 303(a)(4), a strike in derogation of the employer's assignment of the work would be sufficient to establish a violation, absent an order or certification. But, if the Board were then to find under Section 10(k) that the striking union was entitled to the work on other grounds, it would be sanctioning conduct which had been declared unlawful under Section 303(a)(4).

As stated by the Fifth Circuit in *Local 450, supra*, 275 F. 2d at 413, this Court's holding in *Juneau Spruce*

is strongly persuasive, we think, that the requirements of 10(k) are purely procedural, for it seems highly unlikely that Congress would enact a statute permitting an aggrieved person to sue for damages for a jurisdictional strike, with the quality of the strike finally and irrevocably fixed

without any Board determination, and at the same time provide that the same strike would no longer be an unfair labor practice as a basis for seeking injunction if the Board acting as arbitrator assigned the work to the striking union. Under such a construction the work would have been assigned by the Board to the striking union and no violation of 8(b)(4)(D) would exist, but the employer would still have his right to sue for damages because the strike would still be a violation of 303(a)(4). We conclude that Congress did not intend such an anomaly. * * * ²¹

- B. The Board's interpretation of Section 10(k) constitutes a contemporaneous construction which has been consistently adhered to.**

The Board's reading of Section 10(k), first adopted shortly after the provision was added to the Act in 1947 and consistently adhered to thereafter, should

²¹ In *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, this Court recognized that the terms used in Section 8(b)(4) and 303(a) should be interpreted consistently. Thus, in rejecting the contention that the free speech provisions of Section 8(c) imposed limitations upon unfair labor practices committed under Section 8(b)(4)(A), the Court pointed out that Section 8(c) pertained only to unfair labor practices and therefore could not affect the outcome of a suit for damages under the identical language of Section 303. The Court then said (p. 703):

If Section 8(c) were given the effect which petitioners urge, it would limit Section 8(b)(4)(A) so as to give the words "induce or encourage" a meaning in that section different than they have in Section 303. We think that the words are entitled to the same meaning in Sections 8(b)(4) and 303.

be given "peculiar weight [for] it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315. "Such specific and established administrative interpretation of the statute . . . 'should not be overruled except for weighty reasons.'" *Commissioner v. Estate of Sternberger*, 348 U.S. 187, 199. See also, *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 152-154.

The first case to come before the Board for a Section 10(k) determination was *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (March 2, 1949). The Machinists picketed a vessel undergoing repairs by the Company to compel a transfer of the work from the Company's employees, represented by the Steelworkers, to members of the Machinists. A majority of the Board, finding that the Machinists did not have representation rights to the work in question under the contract which it relied on, concluded that it was not entitled to strike for it.²²

²² Two members of the Board dissented. Mr. Murdock was of the view that Section 8(b)(4)(D) was not intended to apply to disputes between an outside union and an incumbent union but only to disputes between two groups of presently employed employees, and that in any event a Section 10(k) hearing should not be held in the situation presented because it would serve no purpose other than to affirm the employer's assignment. Mr. Houston was of the view

This was followed by the *Juneau Spruce* case, *International Longshoremen's and Warehousemen's Union, Local No. 16*, 82 NLRB 650 (April 1, 1949), discussed pp. 30-33, *supra*, where the Board expressly stated that the employer's assignment of the work would not be disturbed, absent a showing by the striking union that it had bargaining or representative rights with respect to employees performing the work; and that the question of tradition or custom in the industry was thus irrelevant (p. 31, *supra*).²³ This view was amplified in *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Company)*, 82 NLRB 916 (April 8, 1949), rehearing denied, 83 NLRB 341 (May 3, 1949), which also involved an outside union.

In *Local 26, International Fur and Leather Workers Union (Winslow Bros. & Smith Co.)*, 90 NLRB 1379 (July 27, 1950), the Board made its first affirmative determination in a Section 10(k) proceeding. The Fur Workers and Teamsters each represented different units of the employer's employees, and had separate contracts covering each unit. A dispute arose as to whether the work of moving raw materials among the various buildings of

that, although the conduct was within Section 8(b)(4)(D), the dispute was not the type which the Board should determine under Section 10(k). (81 NLRB at 1120-1128.) The majority's answer to these contentions was that the conduct fell within the express terms of Section 8(b)(4)(D), and that Section 10(k) did not give the Board discretion to pick and choose what disputes it would hear (*Id.*, at 1114-1115).

²³ Members Murdock and Houston dissented, for the same reasons advanced in *Moore Drydock*. (82 NLRB at 660-663.)

the employer's plant fell within the Fur Workers' unit or the Teamsters' unit. The employer had assigned the work to the latter unit, whereupon the Fur Workers' struck. The Board, interpreting the two contracts, concluded that the work in question was included in the Fur Workers' unit.

A similar situation was later presented in *National Association of Broadcast Engineers and Technicians, CIO*, 105 NLRB 355 (June 4, 1953). That case, like the instant one, involved a dispute between two groups of a broadcaster's employees, each represented by a different union, over the assignment of remote lighting work. However, there, unlike here, the Board found that the contract between the employer and the striking union covered that work. Accordingly, it held that the employer, in assigning it to the other union, had acted in derogation of the contract. Rejecting the contention that, since there was no Board order or certification entitling the striking union to the work, the Board lacked power to make a determination based on the contract, the Board stated (105 NLRB at 364):

The Board is persuaded that to fail to hold as controlling herein the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements, and invite the very jurisdictional disputes Section 8(b)(4)(D) is intended to prevent * * *.

The propriety of the Board's interpretation of Section 10(k) was reexamined in *Local 562, United Association of Journeymen, et al. (Northwest Heat-*

ing Company), 107 NLRB 542 (December 24, 1953). This involved a situation similar to that in *Moore Drydock* and *Juneau Spruce*, where outside unions were striking to obtain work which the employer had assigned to his own employees who were represented by another union. The Board, newly constituted except for Member Murdock, reaffirmed its prior interpretation, stating (107 NLRB at 549-550):

It is now well established that an employer is free to make [work] assignments free of strike-pressure by a labor organization, "unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Neither the Plumbers nor the Carpenters [the outside unions] claim to be the certified bargaining representative for employees performing heating, air-conditioning, and refrigeration equipment installation work.

We find, accordingly, that the Plumbers and Carpenters were not lawfully entitled to require Brown and Northwest to assign the disputed installation work to members of the Plumbers rather than to employees of Northwest who are members of the Operating Engineers * * * [Footnotes omitted.] ²⁴

²⁴ Member Murdock dissented for the reasons expressed in *Moore Drydock* and *Juneau Spruce*, viz., that Section 10(k) hearings should be dispensed with in cases of this type since the Board could not arbitrate the dispute and thus the 10(k) proceeding was a futile one (107 NLRB at 552-554). Chairman Farmer, who had by then succeeded Chairman Herzog (the latter participated in the *Juneau Spruce* decision), wrote a special concurring opinion, addressed to this contention. He pointed out that Section 10(k), by directing

Finally, the Board, as presently constituted, re-examined and reaffirmed its original interpretation of Section 10(k) in *Local 173, Wood, Wire and Metal Lathers' International Union (Newark & Essex Plastering Co.)*, 121 NLRB 1094 (September 30, 1958). Summarizing its position, the Board there stated (*Id.*, at 1107-1108): "an employer has the right to make [work] assignments, free of strike pressure, unless the employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work, or the claimant union has an immediate or derivative right under an existing contract upon which to predicate a lawful claim to the work in dispute."

In sum, despite the shifts in the Board's membership, the agency's interpretation of Section 10(k) has been consistent and unvarying during the 13 years that the provision has been in the Act. Moreover, Congress has been aware of the interpretation. Not only was it set forth in the annual reports which the Board submitted to Congress,²⁵ but on several occasions the legislature considered changing it.

Thus, in 1949, hearings were held on a bill, introduced by Senator Thomas, which, *inter alia*, would

the Board to hear and determine the dispute in all cases coming under Section 8(b) (4) (D), deprived the Board of discretion to pick and choose what disputes it would hear (107 NLRB at 550-552).

²⁵ See, e.g., *Fourteenth Annual Report of the National Labor Relations Board* (G.P.O., 1950), pp. 100-104; *Seventeenth Annual Report of the National Labor Relations Board* (G.P.O., 1953), p. 195; *Twenty-second Annual Report of the National Labor Relations Board* (G.P.O., 1958), p. 110.

have revamped the Act's jurisdictional dispute provisions. Jurisdictional dispute was redefined to include only disputes between two labor organizations over the assignment of work; the Board was empowered to hear and determine such disputes or appoint an arbitrator for this purpose, and standards for making the determination, including such considerations as past practice, were specifically provided; and a jurisdictional strike was illegalized only if it persisted after, and contrary to, the terms of the determination by the Board or arbitrator. *Hearings before the Committee on Labor and Public Welfare, U. S. Senate, on S. 249, 81st Cong., 1st Sess., pp. 10-11, 25-26, 122-125.* This would have required the Board to make an affirmative determination of the jurisdictional dispute. To facilitate this result, changes were made in the entire structure of Section 8(b)(4)(D), thereby avoiding the problems which would arise from imposing such a requirement on the present Section 8(b)(4)(D) (see *supra*, pp. 20-26). Gerard Reilly, who was a consultant to the Senate Labor Committee at the time of the 1947 amendments, explained the difference between the proposed revision and the existing provision as follows (*id.*, at 847):

Under section 8(b)(4)(D) of the present act, it is an unfair labor practice to strike to enforce a jurisdictional claim unless the employer is violating a certification or an order of the Board.

The legislative history indicates that they meant a preexisting certification or order.

Under the proposed bill, it is not an unfair labor practice to engage in a jurisdictional

strike, even though the union is not certified, but if the union that loses after there has been an arbitration proceeding, and then defies the jurisdictional award, that then becomes an unfair labor practice.²⁶

The Thomas bill was not enacted.

In 1953, hearings were again held to consider changes in the Act, and witnesses testified both against and in favor of, the Board's interpretation of Section 10(k). See *Hearings before the Committee on Labor and Public Welfare, U. S. Senate, on Proposed Revisions of the Labor-Management Relations Act, 1947*, 83d Cong., 1st Sess., pp. 1330, 1348, 2428-2431. One of the critics was Professor Cox, who recommended a specific amendment which would require the Board to make an affirmative determination of the dispute. *Id.*, at 2427.

Nevertheless, this time, too, Congress left Sections 10(k) and 8(b)(4)(D) intact. And, although it

²⁶ Mr. Reilly was subsequently asked by Senator Taft (*Hearings, op. cit., supra*; p. 848) whether there had "been any difficulty with the jurisdictional-strike cases, any dissatisfaction with them, so far as you know, the treatment under the Taft-Hartley law?" The following colloquy ensued:

MR. REILLY. Well, it seems to have cured them pretty well in the printing industry. There have been almost none in the past year and a half it has been in effect.

SENATOR TAFT. As to the effect of the jurisdictional-strike provision of the Taft-Hartley law, hasn't it been to, in effect, force the unions to arbitrate between themselves and accept the arbitration? That would at least seem to be the story in the building trades.

MR. REILLY. In the building trades; yes, sir.

enacted extensive revisions of the Taft-Hartley Act late in 1959, including amendments to various sections surrounding 10(k)—e.g., 10(j) and 10(l)—and to Section 8(b)(4), no change was made in either the procedural or the substantive provisions respecting jurisdictional disputes. “Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction thereon placed by the Board * * *.” *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 366.

C. The Board's interpretation has furthered the basic purpose of Section 10(k).

Finally, the Board's view—that the assignment of the work by the employer, absent the exceptions specified in Section 8(b)(4)(D) itself, is the governing factor in the determination of jurisdictional disputes—has furthered the basic purpose of Section 10(k) to encourage the private settlement of jurisdictional disputes by the parties, without resort to the Board's processes. For since Section 10(k) was enacted in 1947, the overwhelming majority of jurisdictional strikes have been settled voluntarily, without resort to 10(k) proceedings.

In May 1948, the Building and Construction Trades Department of the AFL, the Associated General Contractors of America, and various employer associations made an agreement setting up a National Joint Board for the Settlement of Jurisdictional Dis-

putes in the building and construction industry."²⁷ Other efforts, too, have been made to settle these disputes without invoking the Board's processes.²⁸ And, to facilitate compliance with these procedures, the Board has held that, where the parties have agreed to a voluntary method of adjustment, they must follow that procedure and abide by its award; if they do not, the Board will not redetermine the dispute itself, but will immediately invoke the conventional unfair labor practice remedies (see n. 9, *supra*, p. 21).

Records compiled by the Board's Administrative Statistics Branch show that, during the 12-year period from the enactment of Section 10(k) in 1947 to July 1959, 1,181 cases involving an alleged violation of Section 8(b)(4)(D) were closed. In only 95 of these was it necessary for the Board to go to a hearing under Section 10(k). The remaining 1,086 cases were resolved by settlement, by voluntary adjustment of the dispute, or, in some instances, by dismissal of the charge when investigation revealed insufficient basis therefor to warrant a hearing. And of the 95 cases that went to hearing, in 18 the Board thereafter quashed the notice of hearing—in 8 cases because, although investigation had revealed a probable violation of Section 8(b)(4)(D), the facts de-

²⁷ See *Jurisdictional Problems in Construction Industry*, 40 LRRM 18 (July 25, 1957); Rains, *Jurisdictional-Dispute Settlements in the Building Trades*, 8 Lab. L.J. 385, 390-394 (1957).

²⁸ See agreement between IAM and Brewery Workers, 40 LRRM 93; Proceedings of the Third Constitutional Convention of the AFL-CIO, Vol. II, pp. 300-303, 315-316 (1959).

veloped at the hearing showed no possible violation; in 1 case, because the charging party was found to be fronting for a union which had not complied with the filing requirements of Section 9(f), (g) and (h); and in the other 9, because the hearing disclosed that there were in fact agreed-upon methods for voluntary adjustment of the dispute.²⁹

This experience, covering more than a decade, shows that the Board's interpretation has enabled Section 10(k) to achieve its basic purpose of prompting voluntary adjustment of jurisdictional disputes.³⁰ On the other hand, as we have shown (*supra*, p. 25), the court of appeals' interpretation would

²⁹ In the remaining 77 cases which went to Section 10(k) hearing, the Board issued a Decision and Determination of Dispute. 66 involved a finding, as in the instant case, that the striking union was not entitled to strike to force the employer to change its work assignment; in 11, the Board found that the striking union was entitled to the work under an outstanding Board certification or contract. In only 14 of such cases was it thereafter necessary for the Board to issue an unfair labor practice order.

³⁰ See also, *Herzog v. Parsons*, 181 F. 2d 781, 788 (C.A. D.C.), certiorari denied, 340 U.S. 810, where it was pointed out that, on December 31, 1948, the Joint Committee on Labor-Management Relations (created by Sec. 401 of the Labor Management Relations Act) filed a report which states (Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 57):

The Committee is happy to report that the history of [Section 8(b)(4)(D)] during its 17 months' existence has not been one of Board hearings and orders. The Board has yet to decide a jurisdictional dispute. Formal action has been initiated in three cases.

And note Senator Taft's comments in n. 26, *supra*, p. 42.

encourage the very strikes that Section 10(k) is designed to avoid.

- D. The grounds relied on by the court of appeals do not justify its rejection of the Board's settled interpretation of Section 10(k).**

The court of appeals held that the Board's interpretation of Section 10(k) is contradicted by the legislative history, would serve no useful purpose, and was contrary to the Board's own rules (R. 109-112).³¹ We submit that these arguments are unsound, and do not justify the rejection of the agency's settled administrative construction.

1. The legislative history

Section 10(k), as originally introduced, gave the Board the alternative of hearing and determining the jurisdictional dispute itself or of appointing an arbitrator for that purpose. In conference, the authority to appoint an arbitrator was deleted, a deletion which was criticized on the ground that the faster arbitration procedures were better suited for determining jurisdictional disputes than were Board procedures. See, e.g., 93 Cong. Rec. 6452, Leg. Hist. 1554. (Senator Morse). It is contended that this indicates Congress contemplated that a Board determination of the dispute would involve an affirmative

³¹ The court below limited itself to a "brief summarization" of the legislative history, and referred to *National Labor Relations Board v. United Association of Journeymen*, 242 F. 2d 722 (C.A. 3), where such history is "fully reviewed" (R. 110).

award, based on all of the factors which an arbitrator would normally consider.

But it does not necessarily follow that because Congress eliminated the provision for an arbitrator, it intended the Board to perform an arbitrator's task. The inference that this was so was drawn in the Congress by opponents of the bill,³² who are usually not a reliable guide to the meaning of the legislation.³³ Another equally plausible inference is that the Conference recognized that, for the reasons previously set forth, an arbitration-type decision would bring Section 10(k) into conflict with Section 8(b)(4)(D) and other provisions of the Act. Accordingly, it was decided to confine the Board to determining whether the striking union was entitled to claim the work under an outstanding order or certification. And, since this kind of a determination imposed no special burden on the Board nor involved considerations beyond its competence, there was no longer any need for an arbitrator.

This conclusion is confirmed by Senator Taft's subsequent remarks. He pointed out (pp. 28, 25, *supra*) that Sections 8(b)(4)(D) and 10(k) were not intended to supersede the restrictions imposed by Section 8(a)(3), nor to enable a union, by striking, to obtain more than it could otherwise obtain through the Act's representation procedures. As we have

³² See, e.g., 93 Cong. Rec. 1846, 4034-4036, 4841, 6453, 6506, 7487, Leg. Hist. 985, 1046-1048, 1360, 1554-1555, 1585, 918-919.

³³ See *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 288.

shown, these results could be achieved only if the Board's Section 10(k) proceeding were limited to the representation questions which it considers therein.

2. *The contention that the Section 10(k) proceeding serves no useful purpose*

Nor does it follow that, under the Board's view, the Section 10(k) proceeding becomes pointless. R. 109; see *United Association of Journeymen, supra*, 242 F. 2d at 726. To be sure, the question of whether the striking union is entitled to claim the work under an outstanding Board order or certification, or contract, could be determined, as a matter of defense, in the 8(b)(4)(D) unfair labor practice proceeding. But a useful purpose is served by having that question determined prior thereto.³⁴

The Section 10(k) proceeding, like a hearing in a representation proceeding under Section 9, is informal and non-adversary. It is still a part of the investigatory stage of the case. The fuller facts developed in the 10(k) hearing may show that the con-

³⁴ Of course, if the issue of whether the striking union has representation rights with respect to employees performing the work is determined in the 10(k) proceeding, there is no need to have two administrative determinations of the question. *National Labor Relations Board v. Local 450, International Union of Operating Engineers*, 275 F. 2d 420 (C.A. 5). For, as in the case of unfair labor practice proceedings which contest the validity of a certification issued in a representation proceeding, issues heard and determined in the latter are not subject to relitigation in the former. See *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146; *National Labor Relations Board v. Smythe*, 212 F. 2d 664 (C.A. 5).

clusions reached earlier in the investigation were erroneous, and that proceedings under Section 8(b)(4)(D) are thus unwarranted—e.g., that the union was not in fact striking for objects proscribed by Section 8(b)(4)(D), or that the dispute had in fact been adjusted under voluntary methods, or was subject to such adjustment.³⁵ Moreover, even where it appears that the dispute is one which the Board may properly determine under Section 10(k) and it proceeds to do so, that proceeding serves a function. Its informal nature and the fact that the parties are afforded an opportunity to abide by the 10(k) determination before formal unfair labor practice proceedings are instituted, provide an atmosphere more conducive to settlement than would be the practice of having the 10(k) issues handled in the 8(b)(4)(D) proceeding itself. This is evidenced by the experience cited above (pp. 44-45, *supra*), which shows that in only 14 cases was it necessary for the Board, after it had made a 10(k) determination, to proceed to formal unfair labor practice proceedings.

³⁵ *Ship Scaling Contractors Association*, 87 NLRB 92 (1949); *Communications Workers of America (The Mountain States Telephone and Telegraph Co.)*, 118 NLRB 1104 (1957); *American Wire Weavers' Protective Association (The Lindsay Wire Weaving Company)*, 120 NLRB 977 (1958); *General Warehousemen and Employees Union (Roy Stone Transfer Corp.)*, 99 NLRB 662 (1952); *Local Union No. 9, Wood, Wire, and Metal Lathers International Union (A. W. Lee, Inc.)*, 113 NLRB 947 (1955); *Local Union No. 1, Sheet Metal Workers International Association (Refrigeration and Air Conditioning Contractors Association of the Peoria Area)*, 114 NLRB 924 (1955).

In short, consistent with its purpose, the Section 10(k) proceeding, even under the Board's view thereof, serves the real function of obviating, in most cases, the necessity for utilizing the Act's formal unfair labor practice sanctions to settle jurisdictional strikes.

3. *The Board's rules*

The short answer to the Court's statement (R. 112) that the "Board's own rules * * * recognize its power to allocate disputed tasks" is that the Board rules in effect at the time of the Section 10(k) proceeding here did not in fact provide for an arbitration-type determination. Section 102.73 of those Rules (Series 6, as amended) provided that:

Upon the close of the [Section 10(k)] hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as it may determine, to certify the labor organization, or the particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue, or to make other disposition of the matter. [Emphasis supplied.]

Reading this provision in the light of the gloss placed thereon by the Board's decisions (pp. 35-40, *supra*),³⁶ it is apparent that the reference to "certifying" the labor organization or other group which shall perform the particular work task was merely intended to encompass the situation where the Board, finding that the question of work assignment was governed

³⁶ See *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414.

by an outstanding Board order or certification, or contract, would proceed to interpret its scope. Similarly, the phrase "make other disposition of the matter" was intended to encompass the situation where the striking union had no such basis for overriding the employer's work assignment, and the Board would so find. So interpreted, the Board's rules were entirely consistent with the procedure followed here.³⁷

³⁷ To clear up any possible ambiguity in the rule as it previously existed, the Board rephrased this rule on May 14, 1958 (23 F.R. 3259). The relevant language is now part of Section 102.90 (p. 57, *infra*), and reads as follows:

Upon the close of the [Section 10(k)] hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. * * *

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with instructions to enforce the Board's order.

Respectfully submitted.

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SEPTEMBER 1960.

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), in addition to those set forth pp. 2-3, *supra*, are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9.

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10.

* * *

(1) Whenever it is charged that any person has engaged in an unfair labor practice within

the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the pur-

poses of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4) (D).

* * *

B. The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, effective November 13, 1959 (24 F.R. 9095), are as follows:

RULES AND REGULATIONS

* * *

Subpart F—Procedure to Hear and Determine Disputes Under Section 10(k) of the Act

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the regional director of the office in which such charge is filed or to which it is referred shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, he shall give it priority over all other cases in the office except other cases under section 10(l) of the act and cases of like character.

SEC. 102.90 Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of the filing of said charge together with a notice of hearing under section 10(k) of the act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of hearing. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.64 to 102.67, inclusive. Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, seven copies thereof shall be filed with the Board at Washington, D. C., within 7 days after the close of the hearing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be

accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D. C., 3 days prior to the due date with copies thereof served on each of the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4) (D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If, either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods

for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and sections 102.90 to 102.92, inclusive, are inapplicable.

* * * *

STATEMENTS OF PROCEDURE

* * * *

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

SEC. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*

—The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b).

SEC. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*

—These matters are handled as described in section 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the act, are given priority over all other cases in the office except other cases under section 10(1) of the act and cases of like character.

SEC. 101.33 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of filing of the charge together with a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of hearing. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the act, or any other satisfactory method to resolve the dispute.

SEC. 101.34 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record

before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

SEC. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

SEC. 101.36 *Compliance with determination; further proceedings.*—After the issuance of determination by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that the parties are complying with the determination, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b) (4)(D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15, inclusive.

FILE COPY

No. 69

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL
1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORK-
ERS, AFL-CIO, *Respondent*

On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 69

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL
1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORK-
ERS, AFL-CIO, *Respondent*

On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 107-112) is reported at 272 F. 2d 713. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 2-14) in the unfair labor-practice proceeding are reported at 121 NLRB 1207. The Board's earlier Decision and Determination of Dispute (R. 14-20) is reported at 119 NLRB 594.

JURISDICTION

The court below entered its judgment on December 28, 1959 (R. 113-114). The petition for a writ of certiorari was granted on May 31, 1960, 363 U.S. 802 (R. 114). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The statutory provisions directly and indirectly involved are set forth in the Board's brief, pp. 2-3, 53-56. Respondent also relies on Section 102.73 of the Rules and Regulations of the Board in effect at the time of the proceedings herein before the Board (App. C, *infra*).

QUESTION PRESENTED

Whether Section 10(k) of the National Labor Relations Act and Section 102.73 of the Board's Rules and Regulations in effect at the time of the Board proceedings in this case required the Board to determine a dispute over who was entitled to the assignment of a specific work task.

STATEMENT OF THE CASE

This case arose out of a dispute concerning the lighting on a television show to be broadcast on April 21, 1957 by the Columbia Broadcasting System Inc. ("CBS"), the only employer involved in this proceeding. Two unions with which CBS had contracts claimed the work for the employees they represented.¹ Because the dispute could not be settled, the telecast of the show was called off.

The present proceeding was started on April 26, 1957 when CBS filed a charge with the Board, asserting that respondent had violated Section 8(b)(4)(D) of the Act (R. 14-15). Pursuant to Section 10(k), a hearing was held before a hearing officer. The Board thereafter issued its Decision and Determination of Dispute (R. 14-20.)

As the Board found in that Decision, respondent was certified by the Board in 1952 as the statutory representative of certain CBS technicians (R. 16). Respondent and

¹ These were (1) Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, respondent herein, and (2) Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (herein called "IATSE").

CBS entered into an agreement on May 1, 1956, to run to January 31, 1958, covering specified technical employees (R. 16). CBS entered into a contract with IATSE on June 23, 1955, to run until December 31, 1957, covering stage hands (R. 16). (IATSE does not hold any certification at CBS.)

In the negotiation of these contracts, both unions attempted to get CBS to settle an issue that had plagued the industry for years—the assignment of employees to the operation of lighting on “remote” television shows, that is, shows originating outside of a regular television theatre or studio (R. 21). As to such broadcasts, there had been a “running dispute” for years, with the employer handling assignments on a “case-by-case” basis (R. 75, 29, 78).² As each of the two contracts came up for negotiation, the union involved urged CBS to settle the matter by expressly making its contract applicable to the disputed work (R. 27-31, 67). CBS refused on the ground that it was “not free to make a commitment where there were conflicting claims” (R. 28). Because the three parties could not agree, the whole thorny problem “was left as it had been before” (R. 30).

The broadcast of the Antoinette Perry (“Toni”) Awards of the American Theatre Wing, scheduled for April 21, 1957, which originated at the Waldorf-Astoria Hotel, fell predictably into this disputed and still unresolved area (R. 21-22, 26). CBS decided that the work should be “assigned to IA [TSE]” and so informed respondent (R. 22, 50, 51-52).

The Board found, despite some ambiguity as to the events, that representatives of respondent refused to operate camera equipment for the show unless the technicians it represented were also allowed to do the lighting and that, as a result of this refusal, the television broad-

² The CBS vice-president in charge of labor relations, W. C. Fitts, Jr., testified that the dispute had been going on ever since he joined the Company in 1950 (R. 21, 75).

cast of the show was cancelled (R. 17-18).³ For the purposes of this proceeding only, respondent concedes the correctness of that finding.

At the Section 10(k) hearing, the CBS official who made the assignment to IATSE testified that he had done so on the basis of "the general criteria that we had used in the past" (R. 23, 78-79, 81-84). However, respondent was not allowed to go behind that statement. It offered to show that the lighting of most of the remote broadcast in the past had been done by its members but its offers were consistently rejected (R. 79-83, 84, 88-94).⁴ This was done under the Board's theory that the resolution of such disputes must be left entirely to the employer. As the hearing officer put it, "CBS is at liberty to go on making its decisions on a day-to-day basis" (R. 81); "they can be as inconsistent as they please" (R. 83). It was even possible for CBS to refuse to specify the manner in which it made these assignments so important to the men involved (R. 84-85).

In its Decision and Determination of Dispute, the Board declined to determine the dispute concerning the lighting on remote telecasts, saying that an employer is free to make work assignments in the absence of a Board order or certification or a union contract covering the work in question (R. 18-19). Accordingly, the only formal finding it made was that respondent was not entitled, by means forbidden by Section 8(b)(4)(D), to force CBS to assign remote lighting to its members, rather than to other CBS

³ It was suggested that the telecast proceed using only the existing house lights, but this was vetoed by IATSE (R. 85-86).

⁴ Respondent offered to prove, by witnesses and documentary evidence, that lighting of remote telecasts had generally been done by IBEW technicians; that, during the 12 months prior to the first hearing, there had been about four remote telecasts a week; that the lighting on 95% of these telecasts had been done by IBEW men; that the "Toni" Awards show at the Waldorf Hotel was similar to other shows broadcast from hotels which CBS had assigned to IBEW men; and that CBS departed from its normal practice in this case (R. 81-82).

employees who are members of IATSE (R. 19). It added that its action was not "to be regarded as 'assigning' the work in question to Local 1 [of IATSE], as we are not called upon to pass on that question" (R. 19).

On being informed by respondent that it would not comply with this "determination" (R. 71), the Board processed the CBS charge through the usual steps under Section 10(b), including a brief hearing, a Trial Examiner's Intermediate Report (R. 2-11) and a Board Decision and Order (R. 11-14). At this second hearing, respondent renewed its offers of proof (R. 101-106). It also moved for dismissal of the Board's complaint because of the Board's failure to make a proper determination under Section 10(k) and for remand of the matter to the Board to make such a determination (R. 98-100). The Trial Examiner rejected the offers and denied the motions (R. 100, 103). In its decision, the Board upheld these rulings of the Trial Examiner (R. 12) and adopted his finding that respondent had violated Section 8(b)(4)(D) by encouraging CBS employees to engage in a concerted refusal to perform services with the object of forcing CBS to assign remote lighting to members of respondent rather than to members of IATSE (R. 8-9). It ordered respondent to cease and desist from such concerted refusals and to post appropriate notices (R. 12-15).^a

^a The Board's order provides that respondent shall cease and desist from taking certain action designed to force CBS to "assign the work of operating lights on remote television pick-ups to members of the Respondent Union rather than to members of IATSE (R. 13). It is the position of respondent, presented to the court below, that this order is too broad. Respondent has claimed remote lighting assignments only on those remote telecasts which are not staged at or telecast from an IATSE house or do not involve remote telecasts of shows which originally originated from the studio but which are removed to remote locations on special occasions.

If the decision below is reversed, we suggest that the case be remanded to the court below for disposition of this issue.

A petition for enforcement of this order was thereafter filed by the Board (R. 72-73), but the court below denied the petition on the sole ground that the Board was barred from proceeding on the charge of a violation of Section 8(b)(4)(D) because it had not complied with the mandate of Section 10(k) that it determine the dispute out of which the charge arose. In the court's opinion, "under the Board's view that Congress has left the determination of disputes involving work assignments to the employer, the §10(k) hearing and determination become superfluous" (R. 109). "The scheme of §10(k) is to provide an opportunity for the private adjustment of disputes causing jurisdictional strikes; but in the absence of such adjustment, the Board itself is to determine the disputes . . . Since private adjustment can only envision agreement as to which group is entitled to the work, the Board is required to make this determination where private negotiation proves unsuccessful" (*ibid*). Accordingly, it was not enough, in the court's view, for the Board to have simply determined that respondent was not entitled to strike for the work by virtue of a contract or Board order or certification.

SUMMARY OF ARGUMENT

A. Section 8(b)(4)(D) of the Act makes jurisdictional strikes unfair labor practices. Section 10(k) "directs" the Board to "determine" the "dispute out of which" such an unfair labor practice "shall have arisen." The plain meaning of these words is that the Board's determination under Section 10(k) is to be of the underlying jurisdictional dispute, not of the unfair labor practice issue.

The Board, in effect, urges that the natural, easily understood meaning of Section 10(k) should be set aside because it leads to contradictory and unfortunate results. It fails to make a sufficient showing of a need to rewrite the law Congress enacted or of a power in the agency to do so.

B. The Board's interpretation of Section 10(k) has been rejected by three Courts of Appeals and supported by one. The former have found the Board's administration of Sec-

tion 10(k) contrary to the language of the Act, its legislative history and the Board's own Regulations.

C. The legislative history of Section 10(k) shows with more than usual clarity that Congress expected the Board to make determinations, in the nature of arbitration awards, of disputes over work assignments. Congress specifically rejected a simple prohibition of jurisdictional strikes and inserted a provision for "compulsory arbitration" of work disputes which has no reason for being in the Act if it has not achieved that end. The Board's argument that the decision to have administrative determinations of work disputes was abandoned in the final stages of action on the bill is based on surmise and is contrary to the record. Its alternative hypothesis as to what Congress intended has no support in the debates or reports.

D. The Board has not been consistent in its interpretation of Section 10(k). The Rules it adopted in 1947, immediately after the section was adopted, are the best evidence of the Board's contemporaneous understanding of its thrust. Those Rules clearly contemplated Board determinations of work assignment disputes of the kind it now declines to make. The Board's first decision under Section 10(k), in 1949, made such a determination. It was only thereafter that it adopted its present policy. Since then, the policy has forced it into inconsistencies, requiring distortions of other sections of the Act which would be unnecessary if it were administering Section 10(k) according to its plain terms.

There has been no approval of a "consistent" interpretation of Section 10(k) by Congress. The 1949 debates which indicate Congressional satisfaction with the operation of the section occurred before the Board adopted its present policy. The labor act adopted in 1959 was not a general overhaul of the earlier law and, in any case, its adoption took place at a time when the judicial interpretation of Section 10(k) was consistently opposite to that of the Board.

E. The Board's substitute interpretation of Section 10(k) makes proceedings under that section a mere dress rehearsal for subsequent unfair labor practice proceedings. The same issue is decided in the 10(k) hearing as in the 8(b)(4)(D) hearing. The Board's suggestion that the holding of two hearings on the same issue increases the likelihood of informal settlement is not borne out by experience. The lack of specific standards for Board determinations under Section 10(k) does not justify equating decisions under that section with those under Section 8(b)(4)(D). The Board can apply appropriate standards, as it has for 25 years under the statutory provision directing it to determine appropriate bargaining units.

F1. It is not necessary to distort Section 10(k) in order to prevent conflict with Section 303. This Court has established that the remedies under the two sections are independent. Congress expected divergent results under Sections 8(b)(4) and 303 and they are inevitable even under the Board's policy.

2. Jurisdictional strikes are not violations of Sections 8(b)(4)(D) or 303 if the employer is not conforming to a Board order determining bargaining representatives. A 10(k) determination is such an order. It has the effect not of directing the employer to make a particular work assignment but of establishing whether a particular strike is legal.

3. The enforcement provisions of Section 8(b)(4)(D) and 303 are designed to achieve different purposes. The Board's treatment of Section 10(k) as a mere "extra procedural step" is compelled by the Board's pursuit of a "substantive symmetry" that Congress never intended.

G1. The Board's argument that its interpretation of Section 10(k) prevents discrimination based on union membership, in violation of Section 8(a)(3) and 8(b)(2), has no validity in the instant case. In situations such as this, where the work dispute is between two unions, both with members in the plant, there are a number of ways the Board can

make determinations without causing such discrimination. As to the more common case, where one of the contending unions has no members in the plant, the administrative process permits development of appropriate rules for that situation. For example, if Board determinations are made in terms of a particular craft, the employer will remain free to employ any qualified member of that craft regardless of his union affiliation.

2. However, if the natural meaning of Section 10(k) does result in discrimination that would otherwise be a violation of Sections 8(a)(3) or 8 (b)(2), the court below was correct in holding that Section 10(k) controls. Nothing in the history of the Act shows that the principle embodied in Sections 8(a)(3) and 8(b)(2) is subject to no exception.

3. The employer's right to assign work is not absolute. Congress could and did limit it in the special case of jurisdictional disputes. Indeed, it is limited even under the Board's interpretation of Section 10(k).

H. The Board's interpretation frustrates the purpose of Section 10(k). It does not promote informal settlements. The rate of settlement in 8(b)(4)(D) cases is not significantly better than in other cases.

The Board's interpretation does not discourage strikes. Moreover, a recent amendment to the Act eliminates the need for a union to strike to get a 10(k) determination.

By giving the final say to the employer, the Board invites prolongation of chronic disputes. Its interpretation gives employers a strong inducement not to participate in procedures for voluntary settlement of jurisdictional disputes.

Virtually all independent comment on the Board's administration of Section 10(k) has been adverse, from the points of view of both law and practical results.

The continuation of jurisdictional disputes among the employees of the employer here involved pointedly reveals the need for determination of work disputes by the Board.

in the manner intended by Congress, in order to achieve the legislative goal of reducing this form of industrial strife.

ARGUMENT

The decision of the court below that Section 10(k) contemplates "affirmative Board adjudication of disputed work allotments" is correct because it gives, as the Board's policy does not, substance and meaning to the plain language and intent of that section and because it avoids, as the Board's policy does not, rendering superfluous the proceedings under that section. Moreover, the view of the court below is supported by the decisions and reasoning of the Courts of Appeals for the Third and Seventh Circuits in *NLRB v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428 (Hake)* 242 F. 2d 722 (C.A. 3); *NLRB v. United Brotherhood of Carpenters and Joiners of America (Wendnagel)*, 261 F. 2d 166 (C.A. 7).

A. IN 10(k) PROCEEDINGS, THE BOARD MUST DETERMINE THE DISPUTE "OUT OF WHICH" THE UNFAIR LABOR PRACTICE AROSE

Section 8(b)(4)(D) makes a jurisdictional strike an unfair labor practice. Section 10(k) directs the Board to "determine" the "dispute" out of which "such unfair labor practice shall have arisen." Manifestly, the "dispute" referred to is not the unfair labor practice, because that arises "out of" the dispute. The "dispute" can only be the jurisdictional dispute that prompted the strike. Section 10(k) further says that the 8(b)(4)(D) charge shall be dismissed if the parties voluntarily adjust the "dispute" or comply with the decision of the Board. Again, the "dispute" here is something separate from the unfair labor

practice. Both here and in the first sentence of the section, the reference is to the jurisdictional dispute.

Thus, the plain language of Section 10(k) directs the Board to make a determination of the underlying dispute over work assignments. As the Third Circuit said in the *United Association* case, *supra*, "We think this is the only sensible reading of the simple and unambiguous language which Congress employed" (242 F. 2d at 725).⁶

The Board nevertheless urges that the plain meaning of the statute should be distorted for a variety of theoretical and practical reasons. We submit that its arguments should be rejected on the same ground that a similar argument was rejected by this Court in *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355 (1949). There, as here, the Board argued that the normal interpretation of plain statutory language created "what the Board conceives to be an anomalous situation" and that it properly adopted a different interpretation to "prevent circumvention" of other sections of the Act (338 U.S. at 362). This Court held, however, that such arguments did not warrant rewriting the Act, saying, "It is not necessary for us to justify the policy of Congress" (*Id.* at 363).

B. THE INTERPRETATION OF SECTION 10(k) URGED HERE IS SUPPORTED BY DECISIONS OF THREE COURTS OF APPEALS

The question here involved has been presented to the Courts of Appeals for the Second, Third, Fifth and Seventh Circuits. The Second Circuit in the instant case and the Third and Seventh Circuits have upheld the views here

⁶ Even the Board's brief yields to the insistent thrust of the statutory language. It states that the aim of Section 10(k) is to encourage voluntary settlement of the "underlying jurisdictional dispute," which can only be the work dispute, and then says that, absent such settlement, the Board makes "a determination respecting it" (p. 21), but that is just what it does not do under its present policy.

urged by respondent, with only the Fifth Circuit holding the other way.

In *NLRB v. United Association of Journeymen, supra*, charges under Section 8(b)(4)(D) were filed by a union and an employer against another union. The Board's determination, pursuant to Section 10(k) had been that the respondent union had acted illegally. However, in accordance with its current policy, the Board had taken no affirmative action with respect to the challenged work assignment. The respondent union in that case ignored the Board's subsequent order under Section 8(b)(4)(D) and the General Counsel petitioned for enforcement.

The Court of Appeals for the Third Circuit denied the Board's application on the ground that the Board had acted improperly under Section 10(k) in failing to decide the underlying jurisdictional dispute on the merits. The Court referred to the unchallenged interpretation of Section 10(k), running throughout the legislative history of the provision, that a determination of the jurisdictional dispute is required of the Board when the parties themselves are unable to resolve their differences. Reference was also

The Board argues that the decision of the Ninth Circuit in the *Juneau Spruce* case (189 F. 2d 177) "apparently" upholds the Board's interpretation of Section 10(k) (pp. 18, 32). The words quoted by the Board at page 32 follow a passage in which the Court reviewed the facts of the case, including the employer's consistent course of dealing with the union to which it assigned the work. The court then said (189 F. 2d, at 188): *In view of these circumstances and under the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of work by appellee*", i.e., the employer in that particular case. The Board's omission of the words in italics wrongly creates the impression that the court was laying down a general rule that employer assignments are inviolate. The full quotation makes it clear that the court reached no broad conclusion that the Board can never depart from the employer's assignment. In fact, the court noted that the Board did that in the *Winslow* case (discussed *infra*) (189 F. 2d, at 187-188):

made to the rules of the Board itself, and the plain meaning of the statutory language. Whether or not that plain meaning appeared to do violence to other sections of the Act, held the Court, Section 10(k) had to be followed in accordance with its terms. As the court said (242 F. 2d. at 726):

The scheme makes sense only if the first hearing under Section 10(k) is concerned with an arbitration type settlement of the underlying jurisdictional dispute, so that a subsequent Section 10(c) unfair labor practice adjudication becomes necessary only if a union shall fail to respect the jurisdictional boundary which the Board has delineated.

This case was followed in *NLRB v. United Brotherhood of Carpenters, supra*, where the Court of Appeals for the Seventh Circuit also found that the Board's 10(k) hearing was insufficient and lacked a determination of the underlying jurisdictional dispute. Here, the Board issued a "determination" similar to that in the instant case, and failed to make an affirmative award of the disputed work assignment. The Court of Appeals felt impelled to look to the Rules of the Board, as well as the statute, to find whether the Board had granted the requisite hearing to the parties.

The court was primarily concerned with Section 102.73 of the Rules, which is also involved in the case at bar.* It found that the Board had failed to comply with Section 102.73, since there was a failure to certify the "particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue" (261 F. 2d. at 170). It held that the rule "was as binding

* At the time of the Section 10(k) hearing in this case, Section 102.73 of the Board's Rules and Regulations read, in pertinent part:

"Upon the close of the hearing, the Board shall proceed
 ***to certify the labor organization, or the particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue, or to make other disposition of the matter."

upon the Board itself as it was upon any other person or organization." While the court noted the Board's reluctance to interfere with the employer's prerogative of assigning work, it evidently did not deem this reluctance to be controlling over the plain meaning of the rule.

As to the language of the rule permitting "other disposition of the matter," on which the Board relied, the court said that "nothing in the record suggests that the Board attempted or intended to make any disposition of the matter other than to determine it" (261 F. 2d. at 170).*

C. THE LEGISLATIVE HISTORY OF SECTION 10(k) SUPPORTS THE DECISION BELOW

We have shown that the result reached by the court below is clearly required by the unambiguous language of the Act. That language does not need to be buttressed by any aids to construction. However, since the Board insists

* Guy Farmer, chairman of the Board from 1953 to 1955, who accepted the Board's policy while holding that position, has since concluded that "it now begins to appear likely that the Board has done less than it was intended to do under Section 10(k)." Farmer and Powers, *The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes*, 46 Va. L. Rev. 660, 691, also 682-3, 684 (1960). Others have rejected its conclusion that the terms of the statute require its narrow view of Section 10(k). Feldesman, *Work Assignment Disputes as Bargaining Unit Issues*, 6 Syr. L. Rev. 239, 253-5 (1955); Testimony of Archibald Cox at hearings on Proposed Revision of the LMRA, 83d Cong., 1st Sess., Pt 4, 2406, 2428 (1953); Dunlop, *Jurisdictional Disputes*, in NYU 2d Ann. Conference on Labor, 477, 479-480 (1949). Of three comments on the decision of the Third Circuit rejecting the Board's view, two upheld the court (*Comment*, 71 Harv. L. Rev. 1364 (1958); *Comment*, 5 UCLA L. Rev. 349 (1958)) and one upheld the Board (*Comment*, 33 NYU L. Rev. 619 (1958)). The court's decision was also approved in *Note: Special Labor Problems in the Construction Industry*, 10 Stanford L. Rev. 525, 535-539 (1958). The recent comprehensive *Note, Work-Assignment Disputes Under the National Labor Relations Act*, 73 Harv. L. Rev. 1150 (1960) considers the Board's interpretation of section 10(k) erroneous.

that the Act taken as a whole reveals that Congress did not mean what it plainly said in Section 10(k), it is appropriate to examine the legislative history of the Act to determine whether Congress ever expressed any such intent.

We believe from an examination of that history that Congress fully intended Section 10(k) to direct the Board to make determinations of work assignment disputes. From President Truman's first call for a procedure for "peaceful and binding determinations" of jurisdictional disputes to the final debate in which it was assumed that the bill provided for "the arbitration of work task jurisdictional disputes by the Board itself," there was a clear intent to give the Board more than the power to determine the existence of unfair labor practices. Fully aware of the history of jurisdictional disputes, of the fact that they tend to persist regardless of prohibitions, it added to the law a provision to "throw the issue into the field of administrative law." The legislative history set forth below, plainly supports the conclusion, drawn by the Second and Third Circuits, that the Board's interpretation of Section 10(k) negates what Congress intended.

In 1947, the insistent demand for a means of dealing with "jurisdictional disputes" before they led to strikes was recognized by President Truman in his State of the Union Message to the First Session of the 80th Congress.¹⁰ Declaring that strikes arising out of disputes "involving the question of which labor union is entitled to perform a par-

¹⁰ The extended debates on what became the Labor-Management Relations Act of 1947 show lively concern with this issue. It is clear that Congress felt it necessary to deal with disputes between two unions in which the employers "are the helpless victims of quarrels that do not concern them at all." H. Rep. No. 245, 80th Cong., 1st Sess., pp. 23-24 (I Leg. Hist. 314-315). For the debates, see 93 Cong. Rec. 3329-3330, 3534, 3954, 4255-56, 4416, 5107, 5146-47, 7506, A1099, A1296 (II Leg. Hist. 583, 926-7, 993-7, 615, 1012, 1056-57, 1157, 1455, 1496-97), (References to "Leg. Hist." are to *Legislative History of the Labor-Management Relations Act, 1947* (GPO, 1948).

ticular task" should be curbed, he said; "When rival unions are unable to settle such disputes themselves, provision must be made for *peaceful and binding determinations* of the issues." 93 Cong. Rec. 137.

The bill that passed the House of Representatives on April 17 contained provisions making jurisdictional strikes illegal, without any procedure for determination of the underlying dispute.¹¹ Meanwhile, in the Senate, Senator Morse had submitted a bill (S. 858) proposing limited revisions of the 1935 Act. These included a provision, based on his experience as a member of the War Labor Board; at his suggestion, that Board had adopted a policy of requiring arbitration of jurisdictional disputes if not settled voluntarily within 24 hours. 93 Cong. Rec. 1910-11 (II Leg. Hist. 982-983). Section 8(b)(2)(A) of his bill would have made it an unfair labor practice for unions to engage in strikes over the assignment of particular work tasks. 93 Cong. Rec. 1912 (II Leg. Hist. 986). His Section 10(k) would have empowered the Board, or an arbitrator appointed by the Board, "to hear and determine the dispute out of which such unfair labor practice shall have arisen." 93 Cong. Rec. 1913 (II Leg. Hist. 987). Senator Morse

¹¹ The bill, H.R. 3020, defined "jurisdictional strike" in Section 2(15) (I Leg. Hist. 169) and made such a strike unlawful in Section 12(3)(A) (I Leg. Hist. 205).

¹² The Senate Committee reported S. 1126 (I Leg. Hist. 99-157). The Senate ultimately passed the House bill, H.R. 3020, after substituting the complete text of S. 1126. 93 Cong. Rec. 5298 (II Leg. Hist. 1522). As passed by the Senate, Section 10(k) read as follows (I Leg. Hist. 258-9):

- (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have

made it clear that he was concerned with disputes over "work tasks" (93 Cong. Rec. 1910; II Leg. Hist. 981) and that the Board or arbitrator was "to settle the matter" (93 Cong. Rec. 1912; II Leg. Hist. 985).

The Morse proposal was incorporated without substantial change in the bill as reported to the Senate (I Leg. Hist. 113-4, 130-1) and as passed by the Senate (I Leg. Hist. 241, 258-9).¹²

There can hardly be any question that the Senate-approved version of Section 10(k) contemplated determinations of "work disputes," that is, of who should do the disputed work. That was plainly recognized in the Senate Committee Report on the bill, which said, "we have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within 10 days." S. Rep. No. 105, 80th Cong., 1st Sess., p. 8 (I Leg. Hist. 414). See also p. 27 (I Leg. Hist. 433).¹³

Two points should be noted. First, the arbitration concept applied to, and could only apply to, resolution of the work assignment. (The question whether there has been an unfair labor practice, to which the Board now confines its determinations under Section 10(k), is not a matter for

adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board.

¹³ The Committee minority, although opposing the bill as a whole, approved this provision and similarly understood it as providing for "compulsory arbitration of jurisdictional disputes." S. Min. Rept. No. 105, 80th Cong. 1st Sess., p. 18 (I Leg. Hist. 480). They added, "We are confident that the mere threat of governmental action will have beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks . . ." *Id.* at 18-19 (I Leg. Hist. 480-1).

arbitration.) Second, the procedure was designed to settle disputes concerning "work tasks," not concerning unfair labor practices.

The meaning of the bill was further clarified in a colloquy between Senator Morse and Senator Ellender, a member of the Committee and a supporter of the bill (93 Cong. Rec. 4254; II Leg. Hist. 1054). Senator Ellender agreed that its provisions on jurisdictional strikes were based on the Morse proposal, that they were designed to "provide a fair procedure that will result in a settlement of the jurisdictional dispute," that the bill established "a procedure which would throw the issue into the field of administrative law" and that it gives a "method of dealing with the situation, which is through the Board, instead of by direct action on the part of the employer." 93 Cong. Rec. 4256 (II Leg. Hist. 1057).

The Conference Committee bill, which became the Act, followed the Senate Committee's treatment of the jurisdictional dispute problem in all major respects. Jurisdictional strikes were prohibited and the provision for determining jurisdictional disputes was retained. The chief changes were a substantial widening of the scope of the prohibition of jurisdictional strikes and elimination of the provision in Section 10(k) for appointment of arbitrators. The Conference Committee report, referring to Section 10(k), said "The Senate amendment also contained a new section 10(k), which had no counterpart in the House Bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes). The Conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator." (ital. supplied) H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57 (I Leg. Hist. 561).

Again, it should be noted (1) that the "disputes" that the Board is to determine are "between unions", not, as is usually the case with unfair labor practices, between a union and an employer, and (2) the disputes are those "giving

rise to unfair labor practices," not the unfair labor practices themselves. Most important, there is no indication that the Committee believed that the omission of the provision for arbitrators changed the nature of the "disputes" which the Board was to "determine."

When the conference report came before Congress, the only objection to Section 10(k) raised by opponents of the bill was the elimination of the provision for arbitrators. Thus, Senator Morse pointed out that "the Board will have to hear and decide the merits of the disputes in the motion-picture industry," as well as similar disputes elsewhere. 93 Cong. Rec. 6610 (II Leg. Hist. 1554). He urged that the Board was not the proper agency for "determining the merits of a jurisdictional dispute" (*ibid*). Senator Murray said that the section "in effect provides for the arbitration of work task jurisdictional disputes by the Board itself . . ." 93 Cong. Rec. 6665 (II Leg. Hist. 1585). This clear understanding that the Board itself would actually determine the merits of the work disputes was not challenged by supporters of the bill. Indeed, as we have seen, it was accepted in the Conference Committee's report.

The bill was likewise so construed by President Truman when he spoke, in his veto message, of the authority given to the Board "to determine jurisdictional disputes over assignment of work."¹⁴ This view was not questioned by supporters of the bill in their discussion of the veto message.¹⁵

In sum, the intent of Congress in adopting Section 10(k) was to find a remedy for jurisdictional disputes. It re-

¹⁴ President Truman said: "The bill would force unions to strike or to boycott if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This peculiar situation results from the fact that the Board is given authority to determine jurisdictional disputes over assignment of work only after such disputes have been converted into strikes or boycotts." 93 Cong. Rec. 7501 (I Leg. Hist. 916).

¹⁵ See, for example, the comments of Rep. Hartley, 93 Cong. Rec. 7506 (I Leg. Hist. 926-7).

jected a plan for simply prohibiting jurisdictional strikes and decided to combine such a prohibition with provisions for compulsory arbitration of jurisdictional disputes. Compulsory settlement by arbitration was at first proposed, with referral to arbitrators at the option of the Board. The referral to arbitrators was ultimately discarded, leaving the arbitration function to the Board itself. No one involved in the enactment of the legislation, whether in favor or in opposition, was in doubt as to the duty of the Board to settle the work allocation in dispute. The Board and the arbitrators were given the same substantive functions in the Senate Bill. Deletion of the option to appoint arbitrators in the Conference Report did not change the substantive functions of the Board.

If Congress had intended to limit the Board's action to the mere finding and prohibition of an unfair labor practice, Section 8(b)(4)(D) would have been enough. There would have been no Section 10(k). Section 8(b)(4)(D), or the House formula of an outright ban on jurisdictional strikes, would have stood alone. But all the evidence points to a different intent. The addition of Section 10(k), its genesis in the practice of the War Labor Board, and the words used by the legislators in their debates and reports, as well as the President's veto message—all these point to an independent function to be served by Board determinations under Section 10(k)—the resolution of disputes over work allocations.¹⁶

The Board makes virtually no effort to explain away this unusually clear legislative history. It says only that the remarks of opponents of a bill are not reliable indications of its meaning and it then offers what it calls an "equally plausible inference" that would justify its theory (p. 47). To draw this inference, it necessarily concedes that the

¹⁶ See also Farmer & Powers, *supra*, 46 Va. L. Rev., at 684: "This [legislative] history . . . clearly indicates that the Board was expected to decide how the disputed work should be allocated between the contending employee groups." Note, *supra*, 73 Harv. L. Rev. at 1156-7.

bill passed by the Senate did require arbitration of the work dispute by the Board or an arbitrator. It then theorizes that, after the Conference Committee broadened Section 8(b)(4)(D) to cover more than disputes between two unions, it must have decided that there was no longer any need for arbitration and that the Board should decide only whether "the striking union was entitled to claim the work under an outstanding order or certification" (p. 47).

Surely, if any such radical change in the procedure to be followed by the Board had been intended, something would have been said in the reports or debates. If the Senate had understood that the Conference Report had thrown out its plan to have the Board determine the underlying work dispute, there would have been some comment. Yet what we find is a lengthy discussion of the elimination of the provision for appointment of arbitrators, without anyone saying that this was a far too limited view of the change.

The Board's argument that no reliance can be placed on statements by opponents of a bill (p. 47) applies at best to the period after the Conference Committee Report. As we have seen, both sides fully understood that the earlier bill called for arbitration of work disputes. As to the subsequent period, we submit that the Conference Committee Report itself clearly shows agreement by the majority with the interpretation by opponents of the bill. It said that the Board was to "determine disputes between unions giving rise to unfair labor practices" (*supra*, p. 18). This is totally at odds with the Board's theory that the Conference Committee confined 10(k) determinations to "whether the striking union was entitled to claim the work under an outstanding order or certification" (p. 47). If that is what the Committee intended, it chose very inapt words to express itself.¹⁷

¹⁷ The remarks of Senator Taft relied on by the Board at page 28 dealt with the effect of the prohibition in Section 8(b)(4)(D) and not with the procedural effect of Section 10(k). The remarks quoted by the Board at p. 25 are discussed below, p. 48 n. 49.

In sum, the Conference Committee bill, which became the final Act, embodied the understanding of both sides in both houses of Congress, never abandoned, that the Board was to arbitrate disputes over work assignments.

D. THE BOARD HAS NOT BEEN CONSISTENT IN ITS INTERPRETATION OF SECTION 10(k)

The Board argues that its interpretation of Section 10(k), "first adopted shortly after the provision was added to the Act in 1947 and consistently adhered to thereafter," is entitled to weight as a "contemporaneous construction" (pp. 35-36). In fact, however, the Board has not been consistent and its present policy, which was adopted two years after the Act was passed, represents a reversal of its original interpretation.

1. The Board's Rules

The only "contemporaneous" (i.e., 1947) interpretation of Section 10(k) by the Board was its 1947 Rules which clearly envisaged work dispute determinations. Those Rules provided that the Board was "to certify the labor organization, or the particular trade, craft, or class of employees, as the case may be, which shall perform *the particular work tasks in issue*, or to make other disposition of the matter (*infra*, App. C)." ¹⁸

¹⁸ The Rule set forth in the text was still in effect when the Board decided this case. In 1958, however, in apparent recognition that its policies had nullified the words "to certify" in its original Rules, the Board adopted new Rules which provided, in Section 102.80, that, after due hearing, the Board shall proceed "to determine the dispute or make other disposition of the matter" (23 C.F.R. 3259, 3270). This, of course, was a mere return to the language of Section 10(k).

It is difficult to see how the new Rule helps to "clear up any possible ambiguity" in the old Rule, as the Board now suggests (p. 51n). A regulation that merely restates the terms of the statute tells the reader nothing he did not know already.

The court below found that "there seems to have been no compliance with the Board's own rules, which recognize its power to allocate disputed tasks" (R. 112). The Third and Seventh Circuits reached the same conclusion. *United Association* case, *supra*, 242 F. 2d at 726; *United Brotherhood* case, *supra*, 261 F. 2d at 170-171. Indeed, the latter found it so compelling that it rested its decision condemning the Board's present practice primarily on that ground.

The Board argues that it has been following this rule because anything that it does can be brought in under the general clause, "to make other disposition of the matter." It says that it invokes the specific part of the Rule in those cases where the work assignment is governed by a Board order or certification or by a contract (pp. 50-51). Yet elsewhere, it urges that the "usual" 10(k) case does not fall in this category. (p. 26). This means that the Board wrote a Rule specifically dealing with the "unusual" case and left all the "usual" cases to be dealt with under a catch-all clause that draftsmen ordinarily reserve for the situations they may not have anticipated. See Sec. 101.30 App. D.

A much more natural inference from the Rules drafted by the Board in 1947 is that it believed at that time that it would be deciding not only which "trade, craft or class of employees" was not entitled to the disputed work but also which group was.¹⁰

2. The Board's Decisions

This view is reenforced by the fact that the Board did follow the plain intent of its Rule in its first 10(k) determination in 1949. *Moore Drydock Co.*, 81 NLRB 1108. The Board now describes this case as deciding only that the losing union was not entitled to strike for the disputed work (p. 36). But the Board did more than that. It found

¹⁰ The failure of the Board to follow the plain intent of its Rules is an adequate, independent basis for sustaining the decision of the court below, as the Seventh Circuit held in the *United Brotherhood* case, *supra*.

also that the other union *was* entitled to the work assignment. This aspect of the determination in that case is totally inconsistent with the Board's present policy.

In the *Moore* case, one union held the contract with shipbuilders for machinist work on the east side of San Francisco Bay and another held the contract for such work on the west side. The latter union started picketing in an effort to get the work on the east side. The employer involved filed a charge under Section 8(b)(4)(D) and a hearing was held under Section 10(k). A three-man majority of the Board ruled that the Board was *required* to hold hearings under Section 10(k), that the respondent union's contract did not cover the east side and that therefore the respondent union did not have any lawful basis on which to claim the disputed work. It further held that the other union "was entitled to the work in dispute" (81 NLRB, at 1119). The Board then issued its formal Determination that (1) the respondent union was not entitled to force the employer to assign the work to it and (2) that the other union "was entitled to have Moore Drydock Company . . . assign the machinists work to its members" (*id.* at 1120).²⁰

In its second decision under Section 10(k), *Juneau Spruce Corp.*, 82 NLRB 650 (1949), the Board dealt with a situation in which a union demanded that an employer allow its members to do certain work despite the fact that the union represented none of the employer's employees.²¹ The Board held that the union's claim that it had traditionally done such work was irrelevant where the union has "no bargaining or any representative status" (82

²⁰ Members Murdock and Houston dissented. Mr. Murdock would have held that Sections 8(b)(4)(D) and 10(k) were limited to controversies "over the proper allocation of particular work tasks as between different 'classes' of workers" (81 NLRB at 1123). Mr. Houston would have confined Section 10(k) to situations in which the employer was neutral as between the two unions.

²¹ The same dispute was involved in this Court's decision in *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), discussed below at pp. 34-35.

NLRB, at 660). Noting that the employer had assigned the work in question "to its own employees," the Board said that Sections 8(b)(4)(D) and 10(k) "do not deprive an employer of the right to assign work to his own employees" (*ibid*). The Board's formal determination was to the effect that the respondent union was not entitled to force the employer to assign the work to its members. It did not here, or later, issue the kind of decision it issued in the *Moore* case, expressly finding that the successful union was entitled to the disputed work.²²

A further constriction in the Board's administration of Section 10(k) occurred in *International Association of Machinists*, 83 NLRB 477 (1949). The Board there applied its rule to a situation where both of the unions involved had members working for the employer. The Board held that, since the employer had no controlling contract with either union, it was free to decide which of its employees were to do the work. The Board then took a further step away from making an affirmative disposition of work disputes by saying: "We are not by this action to be regarded as 'assigning' the work in question to the Machinists. Because an affirmative award to either labor organization would be tantamount to allowing that organization to require Westinghouse [the employer] to employ only its members and therefore to violate Section 8(a)(3) of the Act, we believe we can make no such award" (83 NLRB at 482). The Board said that, even if this meant that,

²² Again, two members of the Board dissented. Member Murdock would have issued no determination under Section 10(k), believing that this was not the kind of case to which that section applied. The majority, he said, had treated the case as though it were a representation dispute. The Congressional intent, he said, was that the Board "arbitrate" the matter by deciding which craft "ought" to do the work, not that it decide the "unarbitrable question" of who is doing the work (82 NLRB at 662,3). Under the Board's rule, the decision would always go to the group that had received the employer's award. Member Houston concurred in this dissent (82 NLRB at 663, n. 22).

in most cases, the employer would decide the question by his assignment, it saw no way that it could overrule his decision.

3. The Winslow Case Rule

The principle thus established has since been applied in a number of cases.²³ Only a small proportion of these cases, however, involved situations in which both of the rival unions actually represented employees of the struck company. Where that has been the situation, the Board has frequently adopted a different approach, first applied in *Winslow Bros.*, 90 NLRB 1379 (1950). In these cases, the Board does make a determination of the underlying work dispute in a manner that is in obvious conflict with its general rule in 10(k) proceedings.

In *Winslow*, two unions held contracts with the employer covering different groups of workers. A dispute arose over which employees should perform a particular task. One of the unions struck when the employer awarded the work to members of the other. After the employer filed a Section 8(b)(4)(D) charge against the striking union, the Board held a Section 10(k) hearing. In its decision, it said that it regarded the dispute as one over "which of the two bargaining units²⁴ appropriately includes" the disputed work (90 NLRB at 1384). After reviewing the history of the two contracts and applying its usual criteria for determining bargaining units, it held that the disputed job "is included in the production and maintenance employees unit presently represented by" the respondent union and not in the unit represented by the union to whose members the employer had assigned the work (*id.* at 1385).

The Board has followed the procedure thus established

²³ See, for example, *Middle States Tel. Co.*, 91 NLRB 598 (1950); *Central Roig Refining Co.*, 101 NLRB 77 (1952); *Charles E. Myles*, 107 NLRB 542 (1953); *Carrier Corp.*, 111 NLRB 940 (1955); *Denali-McCray*, 118 NLRB 109 (1957); *Southern New England Tel. Co.*, 121 NLRB 1061 (1958).

²⁴ Since neither union held a certification, the term used by the Board must be taken as applying to the areas covered by the two union contracts.

in a number of cases, without regard to which union had benefited from the employer's assignment.²⁵

No effort has been made by the Board to explain how it reconciles this rule with its theory that it cannot go outside the limitations of Section 8(b)(4)(D). The rationale given in the cases is that, if the employer is bound by contract to give specified work to members of the contracting union, it would undermine the collective bargaining system to prevent unions from striking when an employer violates such a contract. *NBC case, supra*, 105 NLRB at 363-5.

However sound this practical consideration may be, the Board's adoption of a special rule in contract cases is administrative legislation, made necessary by the narrow view it takes of Section 10(k). Section 8(b)(4)(D) bars strikes to compel an employer to assign work to one group of employees rather than another except where an employer "is failing to conform to an order or certification of the Board . . ." The Board has added to this clause, "or valid collective bargaining contract," specifically rejecting "a literal construction of Section 8(b)(4)(D)." *NBC case, supra*, 105 NLRB at 364. If the Board were performing its intended function under Section 10(k), this legerdomain would be unnecessary.

The Board entirely fails to explain the *Winslow* rule in its brief. Where necessary to its argument, it simply ig-

²⁵ The Board's award agreed with the employer's assignment in *Safeway Stores*, 101 NLRB 181 (1952); *Equitable Gas Co.*, 101 NLRB 425 (1952); *Ethyl Corp.*, 107 NLRB 463 (1953); *National Broadcasting Co.*, 105 NLRB 355 (1953); *Columbia Broadcasting System*, 114 NLRB 1354 (1955); and *Taliaferro*, 119 NLRB 287 (1957). It conflicted with that of the employer in the *Winslow* case and also in *National Broadcasting Co.*, 103 NLRB 479 (1953); *Columbia Broadcasting System*, 103 NLRB 1256 (1953); *American Broadcasting*, 110 NLRB 1233 (1954) and *Libby-Owens-Ford Glass Company*, 123 NLRB 1183 (1959). In the last named case, the Board appears to have ignored its requirement of an existing contract, but without explaining why. See 73 Harv. L. Rev. at 1154 n. 31.

nores the rule and speaks as though it always accepts the employer's determination unless it violates a Board order of certification (*e.g.*, pp. 32, 34, 47). This is convincing evidence that the Board's interpretation of Section 10(k) creates the very kind of inconsistencies that the Board insists it has avoided.²⁶

4. Subsequent Congressional Action

The Board argues that its "consistent and unvarying" interpretation of Section 10(k) has been approved by Congress by its failure to amend this part of the Act during its sessions in 1949, 1953 and 1959 (pp. 40-43).

Principal reliance is placed on the events of 1949, when a new Congress convened with an apparent majority for revision of the 1947 Act. The Thomas bill described by the Board would have changed Sections 8(b)(4)(D) and 10(k) extensively—but not, as the Board suggests, by the insertion of a new concept of work dispute determinations. The revisions had two purposes: (1) restricting work dispute determinations to jurisdictional disputes in the narrow sense, and (2) permitting appointment of arbitrators. The hearings and reports show that everyone was assuming at that time that the Board *was* determining work disputes under Section 10(k). The Board had not yet issued its decisions nullifying that Section.

Thus, the Thomas bill, as described in the report of the majority of the Senate Committee on Labor and Public Welfare (S. Rep. No. 99, 81st Cong., 1st Sess.) would have retained a limited ban on jurisdictional strikes (pp. 6, 60, 66-7, 74) and contained detailed provisions for determination by the Board of disputes over work assignments, including restoration of the provision for Board appoint-

²⁶ Another example of the inconsistencies bred by the Board's rule is described in Farmer & Powers, *supra*, 46 Va. L. Rev. at 666-667.

²⁷ The report was issued just six days after the Board's first decision under Section 10(k), described above (pp. 23-24). As there noted, it was not until after that decision that the Board adopted its present policy.

ment of arbitrators (pp. 4, 60, 68-69, 75).²⁷ Nowhere in this report is there any suggestion that these provisions would give the Board entirely new powers. The assumption throughout was that the Board was already deciding this issue under Section 10(k). The report of the minority of this Committee approved part of the majority's proposal (S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., p. 78). In reviewing experience under two years of the 1947 Act, the minority also assumed that the Board was determining work assignments under Section 10(k) (*Id.*, at pp. 33-34).

The Hearings held in February of 1949; and particularly the portions which the Board cites (p. 41-42), make it even clearer that no new procedure was intended. Board Chairman Herzog welcomed the proposed restriction of the provisions for determination of jurisdictional disputes to a narrow area because it would "lighten the Board's burden in this new and difficult field of governmental operations" (*Hearings*, p. 124). He also welcomed the provision for arbitrators as easing the Board's responsibility. The same understanding that no new area was being placed under the Board's jurisdiction underlies the testimony of Former Board Member Reilly (*Hearings*, pp. 847-848) and Secretary of Labor Tobin (*Hearings*, pp. 25-26).²⁸

The 1953 hearings show at best limited discussion of this matter and ultimate failure of Congress to enact any legis-

²⁸ The general original understanding of what Section 10(k) meant is revealed independently in the Plan for Settling Jurisdictional Disputes Nationally and Locally, entered into in 1948 by the Building and Construction Trades Department, AFL, the Participating Specialty Contractors Employer's Association and the Associated General Contractors of America, Inc. This plan provided, in Article VIII: "... the members and Chairman of the Joint Board shall tender to the National Labor Relations Board, their services as expert witnesses in any hearing held by the Board under the provisions of Section 10(k) ..." This provision shows that both management and labor in the building industry, where jurisdictional disputes are particularly common, expected the Board to make determinations of the kind in which expert testimony on practices in the industry would be needed.

lation. In these circumstances, "the failure of Congress to amend the statute is without meaning for the purposes of statutory interpretation." *Order of Railway Conductors of America v. Swan*, 329 U.S. 520, 529 (1947).

Finally, we come to 1959, when Congress did amend the Act without changing Section 10(k). The Board insists that that constituted approval of its policy. However, when Congress acted in 1959, the Board had interpreted Section 10(k) one way and two Courts of Appeals another. It is at least as likely that Congress approved the then uniform interpretation by the courts as that it approved the Board interpretation which the courts had rejected. Certainly, a position of the Board which had been rejected by all the Circuit Courts considering the same cannot be said to have been approved by Congressional silence.

Furthermore, the Board is wrong in describing the 1959 Act as embodying "extensive revisions" of the 1947 Act (p. 43). The 1959 Act was primarily aimed at internal union abuses, as is implied by its name, "Labor-Management Reporting and Disclosure Act of 1959." Only the last of its seven titles is devoted to amendments to the 1947 Act and those are confined to a few specific matters. No general overhaul of the 1947 Act was contemplated, or accomplished. The Board points to no evidence that Congress considered the matter of work dispute determinations.

We submit that this record gives the Board no basis for finding Congressional approval of its policy.

E. THE LANGUAGE OF SECTION 10(k) IS INCONSISTENT WITH THE BOARD'S PRACTICE OF HOLDING TWO HEARINGS ON THE SAME SUBJECT

It seems perfectly clear that Congress intended the Board to determine the work dispute in the 10(k) hearing and the entirely different unfair labor practice issue in a subsequent hearing under Section 10(b). The Board's theory, however, forces it into the ludicrous procedure of holding successive hearings on precisely the same issue.

Whenever a violation of Section 8(b)(4)(D) is charged, a hearing is held under Section 10(k), unless the preliminary investigation (made of all charges reveals that the charge is plainly without merit.²⁹ If a 10(k) hearing is held and the case comes to the Board for determination, it first considers whether there is "reasonable cause to believe" that a violation of Section 8(b)(4)(D) has occurred (see, for example, the Determination in this case, R. 18). If, at that stage, it finds no such "reasonable cause," it dismisses the proceedings without further findings.³⁰ If reasonable cause is found, the Board then "determines" the jurisdictional dispute but only in terms of whether the strike which was the basis of the charge was a violation of Section 8(b)(4)(D). It may, despite its previous finding of "reasonable cause," hold that the strike was permissible and issue its determination in those terms. Clearly, in such cases, the Board has decided the same issue it would decide in an unfair labor proceeding.

If the Board holds against the union, and the union fails to accept the Board's determination, the Board then holds a second hearing, under Section 10(b), on the unfair labor practice charge. In this hearing, it decides nothing new, as the decision in the present case shows (R. 214).

Under this arrangement, as the court below said, "the 10(k) hearing and determination become superfluous" (R. 109). The Third Circuit similarly noted that what the Board did in its first proceeding "was to make a decision stating merely that the coercive action of the [respondent union] . . . was illegal." *United Association case, supra*, 242 F. 2d at 724. It then went on to say (242 F. 2d, at 726):

²⁹ The Board's refusal to hold a 10(k) hearing where the 8(b)(4)(D) charge is without merit was upheld in *Herzog v. Parsons*, 181 F.2d 781 (C.A., D.C., 1950), cert. den. 340 U.S. 810.

³⁰ See, for example, *Ship Scaling Contractors Association*, 87 NLRB 92 (1942); *Anheuser Busch, Inc.*, 101 NLRB 346 (1952); *Lindsey Wire Weaving Co.*, 120 NLRB 977 (1958); *Mechanical Contractors Ass'n*, 120 NLRB 1611 (1958).

We do not believe that Congress intended to require judicial enforcement to be preceded by successive administrative determinations of the existence of a particular unfair labor practice. The preliminary Section 10(k) determination *must have some different function*. The scheme makes sense only if the first hearing under Section 10(k) is concerned with an arbitration type settlement of the underlying jurisdictional dispute, so that a subsequent Section 10(c) unfair labor practice adjudication becomes necessary only if a union shall fail to respect the jurisdictional boundary which the Board has delineated.³¹

The Board's effort to show such a "different function" is very weak (pp. 21, 48-50). It admits that the question whether the striking union is entitled to claim the work "could be determined, as a matter of defense, in the 8(b)(4)(D) unfair labor practice proceeding" (p. 48). It argues, however, that the double procedure encourages settlement of disputes because settlement is easier to obtain in the non-adversary 10(k) proceeding than in the "harsher" atmosphere of the "formal" 8(b)(4)(D) proceedings (pp. 21, 50).

We doubt that parties to a 10(k) proceeding such as that held here find any less formality or harshness than in the empty 8(b)(4)(D) ritual that follows.

As every labor practitioner knows, voluntary settlements of Labor Board proceedings are vigorously encouraged by the regional offices of the Board. The parties are always at liberty to compose their differences without pressing for Board determinations. No additional statutory command is needed for this. In fact, it works so well that, as we show below (pp. 46-47), nine out of ten Board cases are settled without formal proceedings. The proportion of 8(b)(4)(D) cases settled without 10(k) hearings is ap-

³¹ See, also, Kovarsky, *The Jurisdictional Dispute*, 42 Iowa L. Rev. 509, 526 (1957), saying of the Board's procedure: "The second hearing, ordinarily, is merely to determine whether the union has obeyed the initial decision." Note, *supra*, 73 Harv. L. Rev. at 1156: "A reasonable Congress could hardly have intended such a fruitless undertaking."

proximately the same as the proportion of other cases settled without 10(b) hearings. Any slight improvement in the record of nine out of ten that might be obtained is hardly worth holding an extra hearing.

Moreover, if it was the purpose of Section 10(k) to encourage settlements, one would expect some hint of this in the voluminous debates and reports of the 1947 Congressional session. As we have shown, all the legislative history points to a different purpose.

In order to justify its deciding the 8(b)(4)(D) issue in its 10(k) determinations, the Board argues that Section 10(k) supplies no standards for the Board's action and that therefore resort must be had to the Act as a whole (p. 19). Thus, the absence of specific standards is the tenuous ground on which the Board reduces Section 10(k) to a mere "extra procedural step" (p. 34).

The absence of specific standards is the result of the legislative history of the section, described above. The section originally included a provision for optional referral of jurisdictional disputes to an arbitrator. While that provision was ultimately eliminated, it is clear that Congress intended the Board to function as an arbitrator in its handling of jurisdictional disputes and, accordingly, it was to draw upon the usual resources used by arbitrators in adjusting jurisdictional differences.³² The Board was to

³² Board Member Murdock, dissenting in *Northwest Heating Company*, 107 NLRB 542, 554 (1953); stated:

As I have indicated above, the legislative history demonstrates that Congress intended by Section 10(k) to give the Board the function of *arbitrating* jurisdictional disputes. As I stated in my opinion in *Juneau Spruce*, although the Act contains no standard to guide the Board in making such determination, the Congress must have known that custom in the trade and in the area, the constitutions and agreements of the contending labor organizations themselves, the technological evolution of the disputed task, and like criteria are those customarily employed by trade unions and interunion arbitrators in adjusting jurisdictional differences.

supply its own relevant standards of judging such disputes, on the basis of its own experience or the experience of other governmental agencies such as the War Labor Board. In much the same way, it has administratively developed criteria for establishing the "unit appropriate for bargaining" in the thousands of representation proceedings it has handled, even though no actual standards were supplied by Congress in the Act as originally passed in 1935.

We submit that the absence of specific standards is neither a warrant for ignoring the plain meaning of the language of Section 10(k) nor an excuse for failing to execute its mandate. Its absence poses no substantial or unfamiliar administrative problem.

F. THERE IS NO CONFLICT BETWEEN THE INTERPRETATION OF SECTION 10(k) BY THE COURT BELOW AND SECTION 303

Section 303(a)(4) of the 1947 Act made jurisdictional strikes "unlawful, for the purposes of this section only," and Section 303(b) permitted civil suits for damages caused by such unlawful conduct. In specifying the conduct condemned, Section 303(a)(4) followed the wording of Section 8(b)(4)(D) exactly.³³ The Board claims that the construction of Section 10(k) here urged by respondent and supported by the court below creates a conflict between Sections 8(b)(4)(D) and 303 which the Board's construction avoids (pp. 29-35). This argument is conclusively answered by the decision of this Court in *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

³³ The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, amended Section 303 by substituting for the detailed description of the conduct condemned in the section a simple provision making it "unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act, as amended."

1. *The Remedies Provided for Violations of Sections 8(b)(4)(D) and 303 (a)(4) are Independent of Each Other.*

The gist of the *Juneau Spruce* decision was that the remedies specified in the two sections for the same conduct "were to be independent of each other. Certainly, there is nothing in the language of §303(a)(4) which makes its remedy dependent on any prior administrative determination." 342 U.S. at 244. The union argued that, until the Board condemned its conduct in a 10(k) proceeding, it could not be found in violation of Section 303(a)(4). This Court held, however, that Section 10(k) is "only a limitation on administrative power" (342 U.S. at 244). The Board would turn this decision around and treat it as equating the two sections, holding Section 10(k) a limitation on neither (p.34). Obviously, that is not what this Court held.

There is nothing inherently incongruous in allowing different results in different proceedings arising out of the same incidents. Congress was expressly warned that District Courts hearing Section 303 cases and the Board administering Section 8 would sometimes reach different conclusions on the same evidence. S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., p. 13, I Leg. Hist. 475; 93 Cong. Rec. 5042, II Leg. Hist. 1358.³⁴ It is not surprising to find that that has since occurred.³⁵

³⁴ A comment on the *Juneau Spruce* decision concluded that Congress "latently contemplated that a different result might follow from a Section 303 procedure than from an administrative procedure." *Comment*, 51 Mich. L. Rev. 307, 309 (1952).

³⁵ For a particularly striking example, compare the companion cases, *United Brick and Clay Workers v. Deena Artware*, 198 F. 2d 637 (C.A. 6, 1952) and *National Labor Relations Board v. Deena Artware*, 198 F. 2d 645 (C.A. 6, 1952).

2. *The Term "Order," as Used in Sections 8(b)(4)(D) and 303(a)(4), Includes Determinations Under Section 10(k).*

We submit, further, that both Section 8(b)(4)(D) and the parallel provisions of Section 303(a)(4) can be limited by determinations under Section 10(k). Both sections are inapplicable when the employer "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing" the disputed work.³⁶ We believe that the term "order," as here used, includes a 10(k) determination.

The Board states that the term "order," as used in the two sections, means an order in an unfair labor practice proceeding (pp. 22, 24). However, it cites only two cases for this, both of which construed the word as it is used in Section 10(f), the provision in the original 1935 Act for court review of unfair labor practice proceedings. There is nothing in those decisions that requires that the same limitation be placed on the term where it appears in an unrelated amendment added twelve years later.³⁷

There is convincing evidence that the determination of jurisdictional disputes under Section 10(k) was from the start viewed as a Board order within the meaning of Section 8(b)(4)(D). The bill, as reported to the Senate and

³⁶ As noted above (p. 34 n. 33), this provision in Section 303 was amended in 1959 by eliminating the detailed language and incorporating Section 8(b)(4) by reference.

³⁷ In one of the two cases cited, *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940), this Court took pains to say, "we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders'." 308 U.S. at 408. The Court in that case passed only on the kind of order "for which the review in court is provided" (*ibid.*).

as later passed by it, contained a prohibition of jurisdictional strikes subject to the exception as to Board orders and certifications (I Leg. Hist. 113-4, 241). The accompanying provision in Section 10(k) for determinations of work disputes by the Board or an arbitrator appointed by the Board provided that: "The award of an arbitrator shall be deemed a final order of the Board" (I Leg. Hist. 131, 259). While this provision was necessarily dropped when the Conference Committee struck out the provision for arbitrators, it shows that the Board determination was regarded as an "order." Thus, it is plain that those who drafted both the original Section 10(k) and the limitation in Sections 8(b)(4)(d) and 303(a)(4), with its reference to a Board "order," regarded the 10(k) determination as an "order," as that term is used in the other two sections.

Such an order can be one determining a "bargaining representative." Section 10(k) determinations do have that effect even as now made by the Board. The Board describes its practice of making determinations in cases where there is an existing contract as the determination of "which of the two existing bargaining units appropriately includes" the disputed work.³³ It explains its policy of making such determinations on the theory that "a union may derive representative rights from a contract as well as from a certification or bargaining order." *Newark & Essex Plastering Co.*, 121 NLRB 1094, 1109, n. 37. Thus, the Board's determinations in such cases can be regarded as "determining the bargaining representative for the employees performing such work," as those words are used in Section 8(b)(4)(D). If a determination of the work dispute over remote lighting had been made here, it would similarly have been a determination of "the bargaining representative." *Farmer & Powers*, *supra*, 46 Va. L. Rev. at 696-7, also at 691.

³³ *Winslow* case, *supra*, 90 NLRB at 1384. The same language is used in subsequent cases. See, e.g., *Libbey-Owens-Ford Glass Company*, 123 NLRB 1183, 1188 (1959).

In short, the "different function" which the Third Circuit found in Section 10(k) is to afford a means of determining a jurisdictional dispute with the view of either terminating a jurisdictional strike in the event the parties abide by the determination or of ascertaining the propriety of a continuing jurisdictional strike in the event that the unsuccessful parties refuse to abide by the Board's determination. It should be noted, in this connection, that the statute does not forbid jurisdictional strikes, as such. Such strikes are regarded as allowable, under both Section 8(b)(4)(D) and Section 303, where an employer "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work" (Section 8(b)(4)(D)). Thus, a continuing jurisdictional strike consistent with a Board order favorable to the striking employees as a consequence of a 10(k) determination would not constitute an unfair labor practice under Section 8(b)(4)(D). Under this view of the law, the effect of a 10(k) determination would not be the imposition of a legal requirement on the employer to assign the work in accordance with the National Labor Relations Board's determination. Rather, it would serve to distinguish between allowable and prohibited economic activity by labor organizations.³⁹

3. *The Provisions for Enforcement of Sections 8(b)(4)(D) and 303(a)(4) are Designed to Serve Different Purposes.*

Whether or not Section 10(k) alters the scope of the prohibitions of Section 8(b)(4)(D), it clearly limits remedial Board action under that Section. The Board conceded this in its brief *amicus curiae* in the *Juneau Spruce* case, *supra*, when it said: "In this view Section 10(k) does not

³⁹ It might be argued further that a Board determination under Section 10(k) would be a defense to an action under Section 303 for damages resulting from a jurisdictional strike prior to the determination, if the Board ruled that the striking union was entitled to the disputed work. However, that question need not be decided here.

constitute a modification of the unfair labor practice defined in Section 8(b)(4)(D), but rather imposes a limitation upon the power of the Board to remedy such unfair labor practices pursuant to Section 10(b) and (c)." (Brief for the Board, Oct. Term, 1951, No. 270, pp. 10-11; see also pp. 16-22.) This view of Section 10(k) as a limitation on the Board's power is entirely inconsistent with the Board's present position that Section 10(k) provides merely an "extra procedural step" (p. 34). This downgrading of Section 10(k) is compelled by the Board's pursuit of a "substantive symmetry between 8(b)(4)(D) and 303(a)(4)" (p. 34) that Congress clearly did not intend.

The independence of the procedure under the two sections established by this Court in the *Juneau Spruce* case, *supra*, is a necessary corollary of the difference between a private action to obtain recompense for injuries and a remedial administrative proceeding brought in the public interest. As the court below said (R. 111):

It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process.

The Board argues that Sections 8(b)(4)(D) and 303(a)(4) prohibit the same conduct and that Section 10(k) does not limit either section (p. 34). It supports this by pointing out that Section 10(k) was added to the procedural provisions of the Act instead of being inserted as a limitation on the prohibitions of Section 8 (p. 24). But even if it is true that Section 10(k) does not affect what conduct constitutes a violation of Section 8(b)(4)(D), it certainly limits the area in which the Board may take remedial action under that section. It is not unusual for Congress to achieve such substantive results by clauses limiting resort to administrative processes.⁴⁰

⁴⁰ Just such limitations were incorporated in Sections 9(g) and 9(h) of the 1947 Act which barred resort to the benefits of the Act by unions that had not filed financial reports and non-Communist affidavits.

The Board's argument entirely ignores the difference in the ends sought to be achieved by Sections 10(k) and 8(b)(4)(D). Section 10(k) furnishes a vehicle for settling jurisdictional disputes. It has nothing to do with proscribing action in furtherance of jurisdictional claims. It does not penalize parties to the dispute. It is unique in the Act because its function is to settle a controversy that has provoked unfair labor practices. If settlement fails, action can still be taken under Section 8(b)(4)(D). If a cause for damages exists, action can be taken under Section 303. Section 10(k) would impose no greater limitation on Section 8(b)(4)(D) under our view than it does now under the Board's view, when Section 8(b)(4)(D) proceedings may be dismissed on voluntary settlement, agreement on a mode of voluntary settlement or acceptance of the Board's determination.

This Court held in *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694, that "The general terms of Section 8(c) appropriately give way to the specific provisions of Section 8(b)(4)." 341 U.S., at 704-5.⁴ Here, it is Section 10(k) that is specific and hence controlling. In unmistakable terms, it directs the Board to determine jurisdictional disputes and bars it from proceeding on the unfair labor practice charge if its determination is accepted.

In adopting Section 10(k), Congress was well aware of the persistent nature of jurisdictional disputes. It knew that they tend to continue despite the most explicit condemnations and prohibitions. It was no doubt aware that even heavy damage awards would not prevent recurrence

⁴ The Board argues (p. 35n) that this Court's decision in the *Electrical Workers* case, bars all divergence between proceedings under Sections 8 and 303. However, this Court there stressed that the interpretation it rejected would have given different meanings to the same words, "induce or encourage," as used in the two sections (341 U.S. at 703). Note: 73 Harv. L. Rev. 1157 suggests a strike to secure disputed work in accordance with 10(k) determination would be "compliance."

of jurisdictional strikes over the same issues. Hence, it provided for governmental "arbitration" of the jurisdictional disputes themselves, while at the same time "setting apart for private redress, acts which might also be subjected to the administrative process" *Juneau Spruce*, case, *supra*, 342 U.S. at 244. That is the fundamental plan that the decision of the court below would restore.

G. THERE IS NO CONFLICT BETWEEN THE INTERPRETATION OF SECTION 10(k) BY THE COURT BELOW AND SECTIONS 8(a)(3) AND 8(b)(2)

The Board asserts that the interpretation of Section 10(k) by the court below would result in discrimination based on union membership and union pressure for such discrimination, in violation of Sections 8(a)(3) and 8(b)(2) of the Act (pp. 26-27. There are several answers to this.

1. No Discrimination Would Result in the Instant Case.

The Board's arguments about possible discrimination ring false in the circumstances of the present case. As the court below noted (R. 111), "in view of the nature of the disputed tasks here involved it is improbable that any employees will be displaced," i.e., discriminated against on the basis of their union membership. The employer, CBS, is completely unionized. The remote lighting which is disputed is only a very small part of the work performed by either union involved. No one will be displaced and no one will have to change his union affiliation if an affirmative award of work jurisdiction is made.

The Board need not even make its determination in terms of the unions involved. It may resolve the jurisdictional dispute in terms of crafts, holding that the remote lighting should be done by technicians or by stagehands.⁴² Or it may speak in terms of bargaining units, as it has done in the *Winslow* type of determination. In both cases, it would be making determinations in terms of which group of men already working for the employer should perform

⁴² This approach is suggested by former Chairman Farmer. *Farmer and Powers*, *supra*, 46 Va. L. Rev. at 684, 685-690 and also in Note, *supra*, 73 Harv. L. Rev. at 1157.

the disputed task. The Board now does this where a certification exists, under the express terms of Section 8(b)(4)(D). It does the same where a contract exists under the *Winslow* rule. It could take the further step of making such determinations where no certification or contract covers the disputed work, as in this case, but where both disputing unions have members employed by the company.

If it did so, it would no longer be necessary for it to invent special reasons for bringing the *Winslow* type of situation under statutory language that plainly does not cover it. One rule, bottomed on the plain language of Section 10(k), would cover all cases.

4. The Board, however, directs its arguments to the situation involving a "stranger" union which does not represent any of the employer's employees.^{42a} It urges that, since most 8(b)(4)(D) cases involve such unions, that situation should determine the governing principles (p. 26).⁴² But administrative decision making is not so blunt an instrument that it cannot distinguish between clearly distinguishable situations. There are many possible approaches to the

^{42a} In the building and construction industry, the construction job is the nexus of the various contractors and trades engaged or to be engaged in the completion of the job. Congress provided special treatment for the unique facts in this industry by its enactment of Section 8(f). A construction trade which is not actually engaged on the job at the particular time the jurisdictional dispute arises can hardly be considered a "stranger" union. See 73 Harv. L. Rev. 1150, 1153 n. 24 and see 93 NLRB 1081 n. 4.

⁴² It should be noted that the Board fails to explain how its approach to Section 10(k) avoids the discrimination which it believes inevitable under the decision below. If discrimination may result from determinations under Section 10(k) in cases such as this, it may equally result from determinations based on certifications or contracts such as the Board now makes. Discrimination may also result from voluntary adjustments settling jurisdictional disputes; yet, such adjustments are encouraged by the Act. This weakness in the Board's case is commented on in Note, *Special Labor Problems in the Construction Industry*, 10 Stanford L. Rev. 525, 538 (1958); Farmer and Powers, *supra*, 46 Va. L. Rev. at 674.

stranger union situation. It is sufficient to suggest one that is implicit in what was said above.

If Board determinations were made in terms of crafts, rather than unions, the employer would remain free to hire or assign members of any union or of no union to the task, provided they had the requisite craft training. Where a particular union had an agreement with the employer covering the work in question, the Board's determination would have the effect of making that union the representative of whatever employees were assigned to the work. If the work did not take the full time of the employee, so that he would be engaged part-time on work covered by another union contract, the Board could regard the employee as represented by both unions. (See Feldesman, *supra*, 6 Syr. L. Rev., at 248).

This approach is not novel. As Professor Cox has pointed out, it is already in effect under the Joint Plan governing jurisdictional disputes in the construction industry. In a brief submitted to the Board in 1957, parts of which are set forth in the Appendix below (pp. 1a-4a), he showed that the Joint Board treats disputes as being conflicts among "crafts or callings" rather than unions. He suggested that, if the Board made work dispute determinations, an award to "electricians," for example, "would leave the contractor free to employ any non-union man who had the craft qualifications and was currently following that calling. The decision, therefore, would not violate the policy of Sections 8(a)(3) or 8(b)(2); it would do nothing to spread unlawful closed or union shop conditions" (*infra*, pp. 3a-4a).

However, the rule applicable to stranger union cases need not be decided here. The only question now presented is whether the Board may abdicate its function under Section 10(k) in a case such as this where two unions are presently recognized by the employer for two different crafts and a jurisdictional dispute arises over work that may be done by either of the crafts they represent.

2. *If Conflict Exists, Section 10(k) Controls*

If application of Section 10(k) according to its plain

meaning does sometimes conflict with Sections 8(a)(3) and 8(b)(2), then Section 10(k), which deals specifically with a special narrow class of cases, must control. The court below properly concluded that: "Congress has apparently adjudged that this interest is outweighed by the policy of settling jurisdictional disputes" (R. 111). The same position was taken by the Third Circuit in the *United Association* case, *supra*, 242 F. 2d, at 727.

There is nothing in the history of the Act, from 1935 on, to indicate that the non-discrimination principle embodied in Section 8(a)(3) is not to be subjected to any limitation whatever. It was limited even in the 1935 Act by the closed shop proviso, under which employee freedom of choice could be limited by the union and the employer. In enacting Section 10(k), Congress may well have decided to give governing weight, in this one narrow area, to the goal of "minimizing or eliminating the wasteful practices that result from such [jurisdictional] conflicts, as well as the protection to which the employer and all other concerned parties are entitled once the representative has been selected." Cole, *Interrelationships in the Settlement of Jurisdictional Disputes*, 10 Labor L. Journ. 454, 456 (1959).

We have argued above that work dispute determinations can be made without causing discrimination based on union membership. If we are wrong in this, it inevitably follows that such discrimination must also occur under the Board's present practices. On the Board's theory, contract case determinations under the *Winslow* rule must result in assigning employees to or withdrawing them from specific jobs on the basis of union affiliation. Indeed, this may also occur whenever the Board rearranges bargaining units determined at earlier dates and under different circumstances."

"If it is true, as the Board suggests, that discrimination can be avoided in such situations because the union "may undertake to represent the employees already assigned to the work without requiring them to become union members" (p. 27n), the same adjustment can be made here.

In such cases, the employer's action is taken in compliance with a Board certification or determination. There is every reason to believe that Congress intended that the strictures of Section 8(a)(3) would not apply to such an action. That section, we submit, does not restrict actions by an employer in accordance with a Board determination under Section 10(k) even if the same action taken by the employer on his own motion would be illegal.

3. *The Employer's Right to Assign Work is Subject to the Requirements of the Act.*

The Board repeatedly asserts an inherent and inviolable right of the employer "to decide who his employees shall be and what work he shall give them" (p. 24). That argument makes little sense in this case. CBS made no selection of individual employees here. It made a choice between unions, with no regard to the individual workers involved (*supra*, pp. 3-4).⁴⁵

The cases cited by the Board (p. 24) are no authority for the alleged absolute employer freedom to assign work. They establish only that the employer is free to hire and fire for reasons other than those forbidden by the Act. Nothing in the Act or in the cases speaks of employer freedom to assign work.

Undoubtedly, in the absence of special circumstances such as a statute or contract, the employer does have that freedom. However, just as the employer's freedom to hire and fire is restricted by Sections 8(a)(3) and 8 (b)(2), in the interest of stable labor relations in interstate commerce, so an employer's freedom to assign work to employees of his own choice is limited by the policy requiring compul-

⁴⁵ The Board found that CBS assigned the lighting work in dispute here to "its Stage Hands; in Local 1's unit" (R.4, 16-17). The reference to this finding in the Board's brief (p. 5) as an assignment "to its stagehands, who were members of IATSE" (p. 5) could be misunderstood. As the record shows, the assignment by Vice-President Fitts was "to Local No. 1," not to any specific CBS employees (R.22-23).

sory settlement of jurisdictional disputes when voluntary methods have failed. However strong the Board's reluctance to face the fact that in this narrow respect our national labor policy was changed in 1947, the statute requires that it consider interference with the employer's arrangements whenever jurisdictional disputes interrupt the free flow of interstate commerce. To ignore this is to ignore the plain meaning and purpose of Section 10(k).

The Board offers no evidence to show that Congress placed the employer's right to assign employees beyond reach even of the machinery to resolve jurisdictional disputes provided in Section 10(k). It concedes that the employer's right to assign work is curtailed in the case of Board orders and certifications (pp. 22, 32, 34) and, as we have shown, it has created an additional limitation in the case of existing contracts. The Board has explained this extension on the theory that "since the right to particular work may arise from a collective bargaining agreement as well as from a Board order or certification," the Board may override an employer's assignment that violates a contract (p. 22). But if "the right to particular work" can arise from a contract, it can also arise from a Board determination under Section 10(k). Under this interpretation, the employer's right to assign work is not subject to government dictation; it becomes the subject of economic contest if the union winning the 10(k) determination elects to dispute the employer's contrary assignment.

H. THE BOARD HAS FAILED TO SHOW THAT ITS INTERPRETATION FURTHERS THE PURPOSE OF SECTION 10(k)

The Board states that its interpretation of Section 10(k) has advanced the Congressional intent to encourage voluntary settlements and argues that it has worked well in practice (pp. 43-46). The evidence it offers is unpersuasive on a number of counts.

1. The Board states that, of 1,181 Section 8(b)(4)(D) cases in 12 years, all but 95 have been settled informally

without the need of a 10(k) hearing (p. 44). But it has always been true of Board operations that the great bulk of all unfair labor practice cases have been settled informally. The Board's figures on 8(b)(4)(D) cases show an informal settlement rate of 91.9%. The overall rate of settlement in unfair labor practice cases in the same period is 89.1%.⁴⁴ The difference is not striking.

Indeed, we might expect a greater difference in view of the nature of 8(b)(4)(D) cases. Jurisdictional disputes tend to be ephemeral because the employer usually gets the job done somehow or other even before the Board's preliminary investigation is finished.

The Board also relies on the fact that in only 14 of the 95 cases in which it held 10(k) hearings was it required to go through an unfair labor practice hearing (p. 45, n. 29). That is only to be expected in view of the fact that the second hearing serves no useful purpose.

⁴⁴ The Annual Reports of the National Labor Relations Board for the fiscal years 1948 through 1959 (G.P.O., Washington, D.C.) show the following figures:

<i>Unfair Labor Practice Cases Closed</i>			
<i>Fiscal Year</i>	<i>Total</i>	<i>Before Issuance of Complaint</i>	<i>Percentage</i>
1948	3,643	3,382	92.8%
1949	4,664	4,199	90.0
1950	5,615	5,098	90.8
1951	5,503	4,800	87.3
1952	5,387	4,778	88.7
1953	5,868	5,103	87.0
1954	5,962	4,975	83.4
1955	6,171	5,329	86.4
1956	5,619	5,030	89.5
1957	5,144	4,444	86.4
1958	7,289	6,654	91.3
1959	11,465	10,685	93.2
TOTALS	72,330	64,477	89.14

2. The Board says that our interpretation would encourage strikes, because unions must strike to get 10(k) determinations and anything that encourages them to use 10(k) would cause strikes (p. 25). But if Congress wrote the Act in a way that requires a strike before Section 10(k) goes into effect, it is hardly appropriate for the Board to nullify that Section in order to correct what it views as a Congressional error."

On the other hand, the Board says, its interpretation encourages unions with jurisdictional problems to file representation petitions under Section 9 (p. 25). But the Board does not show that it has ever decided a jurisdictional dispute in a representation proceeding. In fact, it is the Board's policy not to do so.⁴⁹ Even today, there is no relief that respondent union could obtain by filing such a petition about the remote lighting dispute."

3. By leaving the resolution of jurisdictional disputes to employers, the Board's interpretation invites prolongation of chronic disputes. Board "determinations" under its

"If it was an error. Congress has corrected it by amending the introduction to Section 8(b)(4) by making it an unfair labor practice to threaten to strike because of a jurisdictional dispute. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, Sec. 704.

⁴⁹ *Libbey-Owens-Ford Glass Co.*, 41 NLRB 574 (1942). See also *American Broadcasting Co., Inc.* 112 NLRB 605, 607 (1955); *Plumbing Contractors Ass'n*, 93 NLRB 1081, 1087 (1951); *General Aniline & Film Corp.*, 89 NLRB 467 (1950); *Employing Plasterers Ass'n.*, 118 NLRB 17 (1957).

⁵⁰ The Board cites Senator Taft as supporting resort to representation proceedings in such cases (p. 25). The short answer is, "the Senator was wrong." Farmer & Powers, *supra*, 46 Va. L. Rev. 697. Moreover, even though Senator Taft apparently thought work dispute determinations could be obtained in representation proceedings, he certainly did not imply that they could not be obtained through Section 10(k).

present rule are useless since they are little more than a description of what the employer has done in a particular situation. They have no effect when the same situation arises in a different plant, or even in the same plant, as long as employers "can be as inconsistent as they please" (R. 83). Thus the Board's approach vitiates Section 10(k) in practice, as well as in theory.

Contrary to the Board's rosy view of the effect of its policy, it does not promote settlements. The National Joint Board which the Board cites as an example of its good works (pp. 43-44) has condemned the Board's administration of Section 10(k) in these words (*infra*, p. 1a):

It is the considered opinion of the Joint Board that the doctrine of the *Los Angeles Building and Construction Trades Case* [cited *supra* (p. 25) as *International Association of Machinists*, 83 NLRB 477] is a serious, continuing threat to the success of the Joint Board, and that the widespread application of the doctrine would precipitate increased jurisdictional warfare.

One reason for this conviction is the awareness that the doctrine is a constant temptation to contractors to disassociate themselves from the Joint Board. . . .

Specifically condemning the Board's adherence to the employer's resolution of work disputes, the Joint Board said (*infra*, p. 3a):

It is contrary to the basic philosophy of collective bargaining to deny employees the opportunity to participate effectively in making decisions so important to their own interests.

Former Board Chairman Guy Farmer has concluded:

The weakness in the NLRB policy from the standpoint of private agencies, such as the Joint Board, is that it provides a continual inducement to employers to abandon voluntary methods of settlement and to remain free to secure NLRB determinations supporting

their work assignments when they have not acted contrary to a certification, order or current contract.⁵⁰

4. As against these adverse criticisms of the Board's rule in practice, the Board offers virtually no critical support. To show that Section 10(k) has worked well, it cites the

⁵⁰ Farmer and Powers, *supra*, 46 Va. L. Rev. at p. 671. Other commentators agree. See Kovarsky, *The Jurisdictional Dispute*, 42 Iowa L. Rev. 509, 529 (1957): "The underlying philosophy of the *Irwin-Lyons Lumber Co.* and *Juneau Spruce Corp.* cases has unquestionably added to the number of jurisdictional quarrels." Testimony of Prof. Archibald Cox at *Hearings of Senate Committee on Labor and Public Welfare on Proposed Revisions of the LMRA*, 83rd Cong., 1st Sess., Pt 4, p. 2429: "Fourth, the policy tends to undermine the [construction] industry's own method for eliminating jurisdictional disputes." See also pp. 2415, 2419-20. Comment, 5 UCLA L. Rev. 349, 352 (1958): "Since the decision [of the Third Circuit in the *United Association* case, *supra*] will require the Board to determine the jurisdictional dispute on the merits, it should result in fewer disputes coming before the Board." Dunlop, *Jurisdictional Disputes*, in NYU 2d Ann. Conf'ee on Labor, 477, at 480: "There could be no more fertile way to stimulate jurisdictional disputes."

The position of the employer is further enhanced by the Board's rule regarding the "voluntary adjustment" aspect of Section 10(k). According to the Board, Section 10(k) is not satisfied by such adjustments, or methods of adjustment, unless they are accepted by the employer. See, for example, *United Ass'n. of Journeymen*, 108 NLRB 186, 196-7 (1954). Thus, even if the two unions involved have entered into and regularly observed a method of resolving jurisdictional disputes, the Board will proceed with its 10(k) and 8(b)(4)(D) hearings unless the employer is also a party to the agreement. And in such proceedings, under the rule here challenged, it will enforce the employer's decision. An employer facing the alternatives of either entering into or staying out of an adjustment agreement knows that, if he stays out, he will retain a free hand to make work assignments that the Board will enforce. There is therefore little inducement to him to enter into agreements. This aspect of the Board's policy is criticized in Cole, *Interrelationships in the Settlement of Jurisdictional Disputes*, 10 Labor Law Jour. 454, at 456, 459 (1959).

1948 *Report of the Joint Committee on Labor-Management Relations* (p. 45) and the early 1949 testimony of Former Board Member Reilly (p. 42). Both of these, however, antedated the Board's adoption of its present policy.

The Board also refers to the 1953 hearings on amendments to the Act and states that witnesses testified both "against and in favor of" its interpretation of Section 10(k) (p. 42). Of the three witnesses referred to, one was neutral⁵¹ and the other two were critical. One of the critics, J. Paul St. Sure, President of the Pacific Maritime Association, had this to say of the Board's practice:

The Board has consistently failed to settle jurisdictional issues when presented to it. Although the law directs the Board to determine the dispute out of which interunion picketing arises, it has instead issued "determinations" that one or both of the unions have no right to use picketing to gain their demands. *This action obviously ignores the issue that is the source of the trouble.* The crucial issue is which groups of workers should do the work, not whether one or the other is entitled to use picketing to support its claim to the work. To protect the public against these disputes, there must be a determination as to who should do the work. *The Board avoids the issue; it does not determine it.*⁵²

5. We need look no further than the situation at CBS to see how the Board's rule works in practice. When the two unions called upon CBS to resolve the dispute out of which the unfair labor practices arose, CBS took the position that it "was not free to make a commitment where

⁵¹ This is the testimony of J. S. O'Donnell, President of the National Constructors Association. *Hearings Before the Committee on Labor and Public Welfare, U.S. Senate, on Proposed Revisions of the Labor-Management Relations Act, 1947, 83rd Cong., 1st Sess.*, pp. 1347-9. The best he said for the Board was: "The decisions by the Board in many cases have been fair and have been well received" (p. 1348).

⁵² *Id.*, at p. 1336. The other witness referred to is Professor Cox, whose testimony on this matter is described above (p. 50, n. 50).

there were conflicting claims" (R. 28; see also R. 30). This left the whole matter up in the air, with the employer deciding each case as it came along. It is difficult to imagine a situation better calculated to perpetuate turmoil. Yet it is the necessary result of the Board's view that it has no power to interfere with the employer's resolution of such matters.

It is not surprising, therefore, to find that CBS has repeatedly been plagued by these problems. Differences between respondent and IATSE on three different issues have survived to the point of Board determinations. 103 NLRB 1256, 114 NLRB 1354 and the present case. The very issue involved here, remote lighting, gave rise to another case when IATSE struck against an assignment by CBS to respondent. *Theatrical Protective Union No. 1 (Columbia Broadcasting System, Inc.)* Case No. 2-CD-161. In that case, IATSE eventually yielded.

A Board determination of the merits of this jurisdictional dispute would resolve this situation as Congress intended and would thus execute the legislative command to reduce jurisdictional strikes in interstate commerce.

CONCLUSION

We submit that the Board's interpretation of Section 10(k) ignores the plain meaning of the Act, conflicts with the legislative history, subverts the statutory design for handling jurisdictional disputes, abandons to the employer the responsibility given to the Board by Congress with respect to such disputes, involves the Board in inconsistencies that deprive its rulings in this area of any presumptive validity and has been criticized as both wrong in law and unsatisfactory in practice by disinterested observers. The decision of the court below carries out the plain meaning of Section 10(k) and effectuates the Congressional purpose to reduce jurisdictional strife. It should therefore be affirmed.

Respectfully submitted.

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October 1960

APPENDIX

APPENDIX

A. Excerpt from Amicus Curiae Brief Submitted by The National Joint Board for the Settlement of Jurisdictional Disputes to the National Labor Relations Board in Matter of Wood, Wire and Metal Lathers and Aconstical Contractors Association, Case No. 8-CD-8, pages 59 to 63, July 31, 1957.

It is the considered opinion of the Joint Board that the doctrine of the *Los Angeles Building and Construction Trades* case is a serious, continuing threat to the success of the Joint Board, and that the widespread application of the doctrine would precipitate increased jurisdictional warfare.

One reason for this conviction is the awareness that the doctrine is a constant temptation to contractors to disassociate themselves from the Joint Board. A contractor who adheres to Joint Board procedures runs the risk of decisions that are not to his liking. In theory a non-adhering contractor can make assignments at his pleasure and the NLRB will prevent economic action by the disappointed union. Confronted with these choices an inexperienced lawyer might well advise clients not to stipulate that they will be bound by the Joint Board procedures. More experienced contractors realize that the theoretical protection afforded is often slow or ineffective. They know that what they lose by one Joint Board decision, they may gain by another. They value the coherence of the industry and have faith in self-government. Thus far these factors have been sufficient to bring very wide support for the Joint Board but so long as the *Los Angeles Building and Construction* case stands, there will be the risk of secession by a dissatisfied group. For example, a group of mechanical contractors might bitterly complain of Joint Board rulings assigning air conditioning units to sheet metal workers instead of steamfitters. They would not long remain unaware of the NLRB doctrine. If no other jurisdictional disputes which involved them were brewing, why

should they not withdraw from the Joint Board, make assignments more to their liking, and carry the issue to the NLRB if strikes resulted. They might be joined by unions with parallel interests. The resignation of a single group would not cause serious damage standing alone, but the snowballing effects must not be neglected. If any important group withdraws, other groups are affected and their incentive to adhere to the procedures is greatly lessened.

The second reason for regarding the doctrine of the *Los Angeles Building and Construction Trades* case as a potential threat to the stability of the construction industry is that vesting the power to determine jurisdictional disputes in contractors, puts it in the power of a few contractors to disturb the customs and established practices of the industry. For half a century jurisdictional disputes have been resolved by building trades unions through interpretation of their charters, awards by the AFL Building and Construction Trades Department, the Joint Board and national and local agreements. To give a contractor power to disregard these arrangements not only disturbs established habits but tends to revive jurisdictional differences once settled. For example, the unfortunate dispute between the Carpenters and the Laborers over the removal of concrete forms has been settled by an agreement negotiated between the two unions. If some contractor, through ignorance or perversity, were to make an assignment to laborers inconsistent with the terms of that agreement, the individual carpenters could scarcely be expected to sit quietly by. Of course, concerted action to enforce the agreement would violate Section 8(b)(4)(D) and in due course an injunction might issue, but the fear of an injunction is not likely to prevent the concerted action. One cannot banish strikes by men who feel deeply aggrieved merely by passing a law that there shall be none. Furthermore, if a contractor may deprive carpenters of work assigned to them by the agreement, is it not likely that the carpenters will seek to persuade other contractors to give

them work assigned to the laborers by the agreement? Thus the whole controversy would be gradually reopened. The example could be multiplied into hundreds of similar instances.

Since the clash of interest in a jurisdictional controversy often involves not only differences between two craft unions but also differences between general and specialty contractors, or between different specialty contractors, contractors are entitled to a voice in the decision. In times of slack employment, however, the assignment of disputed work to one craft rather than another may well award the former sufficient job opportunities and deprive the latter of needed employment. It is contrary to the basic philosophy of collective bargaining to deny employees the opportunity to participate effectively in making decisions so important to their own interests.

Furthermore, although the public interest demands the prompt resolution of jurisdictional questions without the stoppage of work, there is no public interest in vesting contractors with the final power of decision. Once in a while the work assignment may make a difference in cost or efficiency but these are rarely significant factors.

The jurisdictional disputes in the construction industry are essentially controversies between employees following different crafts or callings. All the employees have chosen their bargaining representatives. Neither their choice nor their union membership or non-membership will be affected by a decision on the merits of the jurisdictional dispute. Unlike the situation in *Moore Drydock Co.*, 81 NLRB 1108 (1949), where the Board feared the establishment of an unlawful closed shop if it made a determination in favor of either union, true inter-craft controversies can be decided on the basis of craft rights without regard to union membership. A single illustration will make the distinction clear. Suppose that a jurisdictional dispute broke out between the International Union of Operating Engineers and the International Brotherhood of Electrical Workers over the work of unloading electrical equipment with A-

frame trucks. The NLRB could not properly assign the work to the members of either union but in the absence of an agreement to submit the issue to the Joint Board it could, and should, determine whether the work was to be done by men who follow the trade of operating engineer or the calling of electrician. If all the employees are union members the distinction may seem to lack practical significance. Legally the difference is highly important. Awarding the work to electricians would leave the contractor free to employ any non-union man who had the craft qualifications and was currently following that calling. The decision, therefore, would not violate the policies of Sections 8(a)(3) or 8(b)(2); it would do nothing to spread unlawful closed or union shop conditions.

It may be objected that accepting the *Hake* decision would involve the NLRB in the morass of having to decide jurisdictional disputes upon their merits. The task would indeed be frightening and the workload might be killing if the Board sought to develop a whole new set of decisional standards. When the Joint Board was originally established, however, the NLRB Chairman and the General Counsel contemplated deciding such cases according to the customs and practices of the industry (not inconsistent with the public interest) as shown by the charters of labor organizations, voluntary national and local agreements, trade practice and the decisions of various bodies established for the settlement of jurisdictional disputes. Accordingly the Joint Board Agreement authorizes the chairman to appear as an expert witness in NLRB cases.

Through this procedure the jurisdictional decisions of the NLRB could be made to parallel the Joint Board rulings. The constant temptation to look for more favorable action from the NLRB would be eliminated, and both contractors and unions would eschew government intervention in favor of an agency of industrial self-government. The Joint Board would be strengthened. The risk of miring the NLRB in a morass of jurisdictional disputes would be greatly reduced.

B. Legislative History of Sections 8 (b) (4) (D) and 10(k), National Labor Relations Act, as amended.

H. R. 3020, as reported.

Sec. 12 (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

(3) Calling, authorizing, engaging in, or assisting—

(A) any . . . jurisdictional strike . . .

[Section 2] (15) The term "jurisdictional strike" means a strike against an employer, or other concerted interference with an employer's operations, an object of which is to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class.

S. 858 (Morse Bill), II Leg. Hist. 985-87

[4] (b) It shall be an unfair labor practice for a labor organization or its agents—

(2) To engage, or to induce or encourage the employees of any employer to engage, in a strike or in a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, in the course of their employment (A) because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization.

[6] (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (2) (A) of section 8 (b), the Board is empowered to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satis-

factory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

S. 1126, as reported.

[8] (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment . . . (4) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order of certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks . . .

House Conference Report No. 510, on H. R. 3020

[8] (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade,

craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

.

[10] (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

C. National Labor Relations Board Rules and Regulations Series 6, as amended, 1956.

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Subpart E—Procedure to Hear and Determine Disputes Under Section 10 (k) of the Act

Sec. 102.71 Initiation of proceedings; notice of filing charge; notice of hearing.—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the regional director shall investigate such charge, giving it priority over all other cases in the office except cases under paragraph (4) (A), (4) (B), and (4) (C) of section 8 (b) and other cases under paragraph (4) (D) of section 8 (b). If it appears to the regional director that further proceedings should be instituted, he shall cause to be served on all parties to the dispute out of which such unfair labor practice may have arisen a notice of the filing of said charge together with a notice of hearing before a hearing officer at a time and place fixed therein which shall be not less

than 10 days after service of the notice of hearing. The notice of hearing shall contain a simple statement of the issues involved in such dispute.

Sec. 102.72 *Adjustment of dispute; withdrawal of notice of hearing; hearing.*—If, within 10 days after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted or agreed upon methods of voluntary adjustment of the dispute, the regional director shall withdraw the notice of hearing and shall dismiss the charge. Hearings shall be conducted by a hearing officer and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.56 to 102.59, inclusive.

Sec. 102.73 *Proceedings before the Board; further hearings; briefs; certification.*—Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as it may determine, to certify the labor organization or the particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue, or to make other disposition of the matter. Should any party desire to file a brief with the Board, seven copies thereof shall be filed with the Board at Washington, D. C., within 7 days after the close of the hearing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed, and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and copies thereof shall immediately be served on each of the other parties. No reply brief may be filed except upon special leave of the Board.

Sec. 102.74 *Compliance with certification; further proceedings.*—If, after issuance of certification by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the certification,

the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director may proceed with the charge under paragraph (4) (D) of sections 8 (b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern.

Sec. 102.75 *Review of Certification.*—The record of the proceeding under section 10 (k) and the certification of the Board thereon, shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10 (e) and (f) of the act.

D. Statements of Procedure

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Subpart E—Jurisdictional Dispute Cases Under Section 10 (k) of the Act

Sec. 101.26 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10 (k).*—The investigation of a jurisdictional dispute under section 10 (k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4) (D) of section 8 (b).

Sec. 101.27 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*—These matters are handled as described in section 101.3 to 101.7, inclusive. Cases involving violation of paragraph (4) (D) of section 8 (b) are given priority over all other cases in the office except cases under paragraphs (4) (A), (4) (B), and (4) (C) of section 8 (b).

Sec. 101.28 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that further proceedings should be instituted, he issues a notice of filing of the charge together with a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties

to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of hearing. If, within 10 days after service of the notice of hearing, the parties present to the regional director satisfactory evidence that they have adjusted or agreed upon methods of voluntary adjustment of the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. The parties may agree on an arbitrator, a proceeding under section 9(c) of the act, or any other satisfactory method to resolve the dispute.

Sec. 101.29 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence but makes no recommendations in regard to resolution of the dispute.

Sec. 101.30 *Procedure before the Board.*—The parties have 7 days after the close of the hearing to file briefs with the Board and to request oral argument which the Board may or may not grant. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its certification of the labor organization or the particular trade, craft, or class of employees which shall perform the particular work tasks in issue.

Sec. 101.31 *Compliance with certification; further pro-*

ceedings.—After the issuance of certification by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that parties are complying with the certification, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8 (b) (4) (D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15.

SUPREME COURT OF THE UNITED STATES

No. 69.—OCTOBER TERM, 1960.

National Labor Relations Board,
Petitioner,

v.

Radio and Television Broadcast
Engineers Union, Local 1212,
International Brotherhood of
Electrical Workers, AFL-CIO.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[January 9, 1961.]

MR. JUSTICE BLACK delivered the opinion of the Court.

This case, in which the Court of Appeals refused to enforce a cease-and-desist order of the National Labor Relations Board, grew out of a "jurisdictional dispute" over work assignments between the respondent union composed of television "technicians,"¹ and another union, composed of "stage employees."² Both of these unions were certified bargaining agents for their respective Columbia Broadcasting System employee members and had collective bargaining agreements in force with that company, but neither the certifications nor the agreements clearly apportioned between the employees represented by the two unions the work of providing electric lighting for television shows. This led to constant disputes, extending over a number of years, as to the proper assignment of this work, disputes that were particularly acrimonious with reference to "remote lighting," that is, lighting for telecasts away from the home studio. Each

¹ Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO.

² Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

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union repeatedly urged Columbia to amend its bargaining agreement so as specifically to allocate remote lighting to its members rather than to members of the other union. But, as the Board found, Columbia refused to make such an agreement with either union because "the rival locals had failed to agree on the resolution of this jurisdictional dispute over remote lighting."³ Thus feeling itself caught "between the devil and the deep blue," Columbia chose to divide the disputed work between the two unions according to criteria improvised apparently for the sole purpose of maintaining peace between the two. But, in trying to satisfy both of the unions, Columbia has apparently not succeeded in satisfying either. During recent years, it has been forced to contend with work stoppages by each of the two unions when a particular assignment was made in favor of the other.⁴

³ The other major television broadcasting companies have also been forced to contend with this same problem. The record shows that there has been joint bargaining on this point between Columbia, National and American Broadcasting Systems on the one hand and the unions on the other. All the companies refused to allocate the work to either union because the unions did not agree among themselves. Columbia's vice president in charge of labor relations explained the situation in these terms: "All three companies negotiating jointly here took the position that they could not do this. They could not give exclusive jurisdiction because each of them had a conflicting claim from another union." See also *National Association of Broadcast Engineers*, 105 N. L. R. B. 355.

⁴ This phrase was used by the Hearing Examiner to describe the position of Columbia as explained by its Vice President in charge of labor relations.

⁵ See *Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees*, 124 N. L. R. B. 249, for a report of a recent jurisdictional strike against Columbia by the same stage employees' union involved here which resulted from an assignment of remote lighting work favorable to the technicians.

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The precise occasion for the present controversy was the decision of Columbia to assign the lighting work for a major telecast from the Waldorf-Astoria Hotel in New York City to the stage employees. When the technicians' protest of this assignment proved unavailing, they refused to operate the cameras for the program and thus forced its cancellation.⁶ This caused Columbia to file the unfair labor practice charge which started these proceedings, claiming a violation of § 8 (b) (4) (D) of the Taft-Hartley Act.⁷ That section clearly makes it an unfair labor practice for a labor union to induce a strike or a concerted refusal to work in order to compel an employer to assign particular work to employees represented by it rather than to employees represented by another union, unless the employer's assignment is in violation of "an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."⁸ Obviously, if § 8 (b) (4) (D) stood alone, what this union did in the absence of a Board order or certification entitling its members to be assigned to these particular jobs would be enough to support a finding of an unfair labor practice in a normal proceeding

⁶ Respondents, for the purposes of this proceeding only, concede the correctness of a Board finding to this effect.

⁷ 29 U. S. C. § 158 (b) (4) (D).

⁸ "Section 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

(4) . . . to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . to perform any services, where an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . ."

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under § 10 (c) of the Act.⁹ But when Congress created this new type of unfair labor practice by enacting § 8 (b)(4)(D) as part of the Taft-Hartley Act in 1947; it also added § 10(k) to the Act.¹⁰ Section 10 (k), set out below,¹¹ quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions. Accordingly, § 10 (k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes. And even where no voluntary adjustment is made, "the Board is empowered and directed," by § 10 (k), "to hear and determine the dispute out of which such unfair labor practice shall have arisen," and upon compliance by the disputants with the Board's decision the unfair labor practice charges must be dismissed.

In this case respondent failed to reach a voluntary agreement with the stage employees union so the Board held the § 10 (k) hearing as required to "determine the dispute." The result of this hearing was a decision that the respondent union was not entitled to have the work assigned to its members because it had no right to it under either an outstanding Board order or certification, as provided in § 8 (b)(4)(D), or a collective bargaining

⁹ 29 U. S. C. § 160 (c).

¹⁰ 29 U. S. C. § 160 (k).

¹¹ "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

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agreement.¹² The Board refused to consider other criteria, such as the employer's prior practices and the custom of the industry, and also refused to make an affirmative award of the work between the employees represented by the two competing unions. The respondent union refused to comply with this decision, contending that the Board's conception of its duty "to determine the dispute" was too narrow in that this duty is not at all limited, as the Board would have it, to strictly legal considerations growing out of prior Board orders, certifications or collective bargaining agreements. It urged, instead, that the Board's duty was to make a final determination, binding on both unions, as to which of the two union's employees was entitled to do the remote lighting work, basing its determination on factors deemed important in arbitration proceedings, such as the nature of the work, the practices and customs of this and other companies and of these and other unions, and upon other factors deemed relevant by the Board in the light of its experience in the field of labor relations. On the basis of its decision in the § 10 (k) proceeding and the union's challenge to the validity of that decision, the Board issued an order under § 10 (c) directing the union to cease and desist from striking to compel Columbia to assign remote lighting work to its members. The Court

¹² This latter consideration was made necessary because the Board has adopted the position that jurisdictional strikes in support of contract rights do not constitute violations of § 8 (b) (4) (D) despite the fact that the language of that section contains no provision for special treatment of such strikes. See *Local 26, International Fur Workers*, 90 N. L. R. B. 1379. The Board has explained this position as resting upon the principle that "to fail to hold as controlling the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8 (b) (4) (D) is intended to prevent." *National Association of Broadcast Engineers*, *supra*, n. 3, at 364.

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of Appeals for the Second Circuit refused to enforce the cease-and-desist order, accepting the respondent's contention that the Board had failed to make the kind of determination that § 10 (k) requires.¹³ The Third,¹⁴ and Seventh¹⁵ Circuits have construed § 10 (k) the same way, while the Fifth Circuit¹⁶ has agreed with the Board's narrower conception of its duties. Because of this conflict and the importance of this problem, we granted certiorari.¹⁷

We agree with the Second, Third and Seventh Circuits that § 10 (k) requires the Board to decide jurisdictional disputes on their merits and conclude that in this case that requirement means that the Board should affirmatively have decided whether the technicians or the stage employees were entitled to the disputed work. The language of § 10 (k), supplementing § 8 (b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled. The words "hear and determine the dispute" convey not only the idea of hearing but also the idea of deciding a controversy. And the clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8 (b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. To determine or settle the dispute as between them would normally require a decision that one or the other is entitled to do the work in dispute. Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little

¹³ 272 F. 2d 713.

¹⁴ *N. L. R. B. v. Union Association of Journeymen*, 242 F. 2d 722.

¹⁵ *N. L. R. B. v. United Brotherhood of Carpenters*, 261 F. 2d 166.

¹⁶ *N. L. R. B. v. Local 450, International Union of Operating Engineers*, 275 F. 2d 413.

¹⁷ 363 U. S. 802.

interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone. This language also indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks. For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10 (k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer. The § 10 (k) hearing would therefore accomplish little but a restoration of the pre-existing situation, a situation already found intolerable by Congress and by all parties concerned. If this newly granted Board power to hear and determine jurisdictional disputes had meant no more than that, Congress certainly would have achieved very little to solve the knotty problem of wasteful work stoppages due to such disputes.

This conclusion reached on the basis of the language of § 10 (k) and § 8 (b) (4) (D) is reinforced by reference to the history of those provisions. Prior to the enactment of the Taft-Hartley Act, labor, business and the public in general had for a long time joined in hopeful efforts to escape the disruptive consequences of jurisdictional disputes and resulting work stoppages. To this end unions had established union tribunals, employers had established employer tribunals, and both had set up joint tribunals to arbitrate such disputes.¹⁸ Each of these

¹⁸ For a review and criticism of some of these efforts, see Dunlop, Jurisdictional Disputes, N. Y. U. 2d Ann. Conference on Labor 477, at 494-504.

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efforts had helped some but none had achieved complete success. The result was a continuing and widely expressed dissatisfaction with jurisdictional strikes. As one of the forerunners to these very provisions of the Act, President Truman told the Congress in 1947 that disputes "involving the question of which labor union is entitled to perform a particular task" should be settled, and that if the "rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues."¹⁹ And the House Committee report on one of the proposals out of which these sections came recognized the necessity of enacting legislation to protect employers from being "the helpless victims of quarrels that do not concern them at all."²⁰

The Taft-Hartley Act as originally offered contained only a section making jurisdictional strikes an unfair labor practice. Section 10 (k) came into the measure as the result of an amendment offered by Senator Morse which, in its original form, proposed to supplement this blanket proscription by empowering and directing the Board either "to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute."²¹

That the purpose of this amendment was to set up machinery by which the underlying jurisdictional dispute would be settled is clear and, indeed, even the Board concedes this much. The authority to appoint an arbitrator

¹⁹ 93 Cong. Rec. 136.

²⁰ H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 23, I Legislative History of the Labor Management Relations Act, 1947, at 314 [hereinafter cited as Leg. Hist.].

²¹ The amendment was contained in a bill (S. 858) offered by Senator Morse, which also contained a number of other proposals. 93 Cong. Rec. 1913, II Leg. Hist. 987.

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passed the Senate²² but was eliminated in conference,²³ leaving it to the Board alone "to hear and determine" the underlying jurisdictional dispute. The Board's position is that this change can be interpreted as an indication that Congress decided against providing for the compulsory determination of jurisdictional disputes. We find this argument unpersuasive, to say the very least. The obvious effect of this change was simply to place the responsibility for compulsory determination of the dispute entirely on the Board, not to eliminate the requirement that there be such a compulsory determination. The Board's view of its powers thus has no more support in the history of § 10 (k) than it has in the language of that section. Both show that the section was designed to provide precisely what the Board has disclaimed the power to provide—an effective compulsory method of getting rid of what were deemed to be the bad consequences of jurisdictional disputes.

The Board contends, however, that this interpretation of § 10 (k) should be rejected, despite the language and history of that section. In support of this contention, it first points out that § 10 (k) sets forth no standards to guide it in determining jurisdictional disputes on their merits. From this fact, the Board argues that § 8 (b)(4)(D) makes the employer's assignment decisive unless he is at the time acting in violation of a Board order or certification and that the proper interpretation of § 10 (k) must take account of this right of the employer. It is true, of course, that employers normally select and assign their own individual

²² 1 Leg. Hist. 241, 258-259. See also the Senate Committee Report on the bill, S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist. 414.

²³ H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57, 1 Leg. Hist. 561.

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employees according to their best judgment. But here, as in most situations where jurisdictional strikes occur, the employer has contracted with two unions, both of which represent employees capable of doing the particular tasks involved. The result is that the employer has been placed in a situation where he finds it impossible to secure the benefits of stability from either of these contracts, not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy them. Thus, it is the employer here, probably more than anyone else, who has been and will be damaged by a failure of the Board to make the binding decision that the employer has not been able to make. We therefore are not impressed by the Board's solicitude for the employer's right to do that which he has not, and most likely will not, be able to do. It is true that this forces the Board to exercise under § 10 (k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.

The Board also contends that respondent's interpretation of § 10 (k) should be avoided because that interpretation completely vitiates the purpose of Congress to

encourage the private settlement of jurisdictional disputes. This contention proceeds on the assumption that the parties to a dispute will have no incentive to reach a private settlement if they are permitted to adhere to their respective views until the matter is brought before the Board and then given the same opportunity to prevail which they would have had in a private settlement. Respondent disagrees with this contention and attacks the Board's assumption. We find it unnecessary to resolve this controversy for it turns upon the sort of policy determination that must be regarded as implicitly settled by Congress when it chose to enact § 10 (k). Even if Congress has chosen the wrong way to accomplish its aim, that choice is binding both upon the Board and upon this Court.

The Board's next contention is that respondent's interpretation of § 10 (k) should be rejected because it is inconsistent with other provisions of the Taft-Hartley Act. The first such inconsistency urged is with §§ 8 (a) (3) and 8 (b) (2) ²⁴ of the Act on the ground that the determination of jurisdictional disputes on their merits by the Board might somehow enable unions to compel employers to discriminate in regard to employment in order to encourage union membership. The argument here, which is based upon the fact that § 10 (k), like § 8 (b) (4) (D), extends to jurisdictional disputes between unions and unorganized groups as well as to disputes between two or more unions, appears to be that groups represented by unions would almost always prevail over nonunion groups in such a determination because their claim to the work would probably have more basis in custom and tradition than that of unorganized groups. No such danger is present here, however, for both groups of employees are represented by unions. Moreover, we feel

²⁴ 29 U. S. C. §§ 158 (a) (3) and 158 (b) (2).

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entirely confident that the Board, with its many years of experience in guarding against and redressing violations of §§ 8 (a)(3) and 8 (b)(2), will devise means of discharging its duties under § 10 (k) in a manner entirely harmonious with those sections. A second inconsistency is urged with § 303 (a)(4) of the Act,²⁵ which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that since § 303 (a)(4) does not permit a union to establish, as a defense to an action for damages under that section, that it is entitled to the work struck for on the basis of such factors as practice or custom, a similar result is required here in order to preserve "the substantive symmetry" between § 303 (a)(4) on the one hand and §§ 8 (b)(4)(D) and 10 (k) on the other. This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes.²⁶ Since we do not require a "substantive symmetry" between the two, we need not and do not decide what effect a decision of the Board under § 10 (k) might have on actions under § 303 (a)(4).

The Board's final contention is that since its construction of § 10 (k) was adopted shortly after the section was added to the Act and has been consistently adhered to since, that construction has itself become a part of the statute by reason of congressional acquiescence. In support of this contention, the Board points out that Congress has long been aware of its construction and yet has not seen fit to adopt proposed amendments which would have changed it. In the ordinary case, this argument might have some weight. But an administrative construction adhered to in the face of consistent rejection by

²⁵ 29 U. S. C. § 187 (a)(4).

²⁶ *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U. S. 237.

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Courts of Appeals is not such an ordinary case. Moreover, the Board had a regulation on this subject from 1947 to 1958 which the Court of Appeals for the Seventh Circuit thought, with some reason, was wholly inconsistent with the Board's present interpretation.²⁷ With all this uncertainty surrounding the eventual authoritative interpretation of the existing law, the failure of Congress to enact a new law simply will not support the inference which the Board asks us to make.

We conclude therefore that the Board's interpretation of its duty under § 10 (k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. Having failed to meet that responsibility in this case, the Board could not properly proceed under § 10 (c) to adjudicate the unfair labor practice charge. The Court of Appeals was therefore correct in refusing to enforce the order which resulted from that proceeding.

Affirmed.

²⁷ See *N. L. R. B. v. United Brotherhood of Carpenters*, *supra*, at 170-172. The Rules and Regulations adopted in 1947 by the Board provided that in § 10 (k) proceedings, the Board was "to certify the labor organization or the particular trade, craft, or class of employees, as the case may be, *which shall perform the particular work tasks in issue*, or to make other disposition of the matter." (Emphasis supplied.) 29 CFR, 1957 Supp., § 102.73. This rule remained in effect until 1958.